

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 440.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

T. H. DUNN, N. E. DUNN, DON RUSSELL, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

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a **UNITED STATES vs. T. H. DUNN, ET AL.**

a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December term, 1922, of said court, before the Honorable Robert E. Lewis, circuit judge, and the Honorable John C. Pollock, and the Honorable J. Foster Symes, district judges.

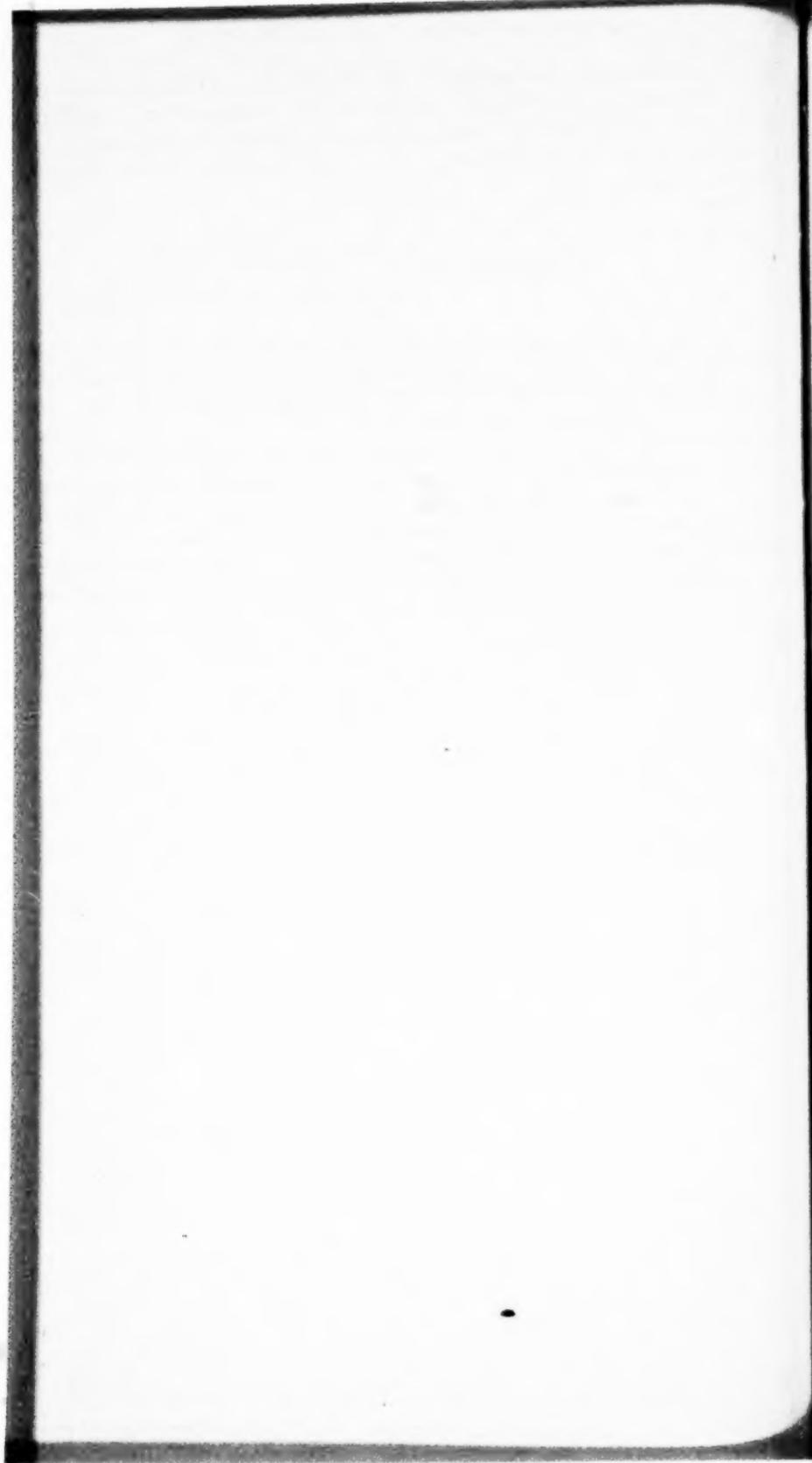
Attest:

[SEAL.]

E. E. KOCH,

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the seventeenth day of February, A. D. 1922, a transcript of record, pursuant to appeals allowed by the District Court of the United States for the Eastern District of Oklahoma, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in certain causes wherein the United States of America was appellant and T. H. Dunn et al. were appellees, and wherein the Bull Head Oil Company et al. were appellants and the United States of America et al. were appellees, which said transcript as prepared, printed, and certified by the clerk of said District Court in pursuance of an act of Congress approved February 13, 1911, is in the words and figures following, to wit:



IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE R. L. WILLIAMS, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

UNITED STATES OF AMERICA, PLAINTIFF,
In Equity *vs.* No. 2591
T. H. DUNN, *ET AL.*, DEFENDANTS.

UNITED STATES OF AMERICA, APPELLANT,
vs.
T. H. DUNN, ET AL., APPELLEES.

BULL HEAD OIL COMPANY, ET AL., APPELLANTS,
vs.
UNITED STATES OF AMERICA, ET AL., APPELLEES.

In the United States District Court for the Eastern District
of Oklahoma.

United States of America, Plaintiff, vs. T. H. Dunn, N. E. Dunn, Don Russell, J. Robert Gillam, Mrs. J. Robert Gillam, L. S. Dolman, Errett Dunlap, Jake L. Hamon, E. L. McCain, J. S. Mullen, F. M. Adams, Bull Head Oil Company and the First National Bank of Ardmore, Defendants.—Equity. No. 2591.

Bill of Complaint.

The United States of America, by its undersigned solicitors, acting by and under the direction of the Attorney

General of the United States, and at the request of the Secretary of the Interior, brings this its bill of complaint against T. H. Dunn, N. E. Dunn and Don Russell, all residents of Oklahoma County, State of Oklahoma; against J. Robert Gillam, Mrs. J. Robert Gillam, L. S. Dolman, Errett Dunlap, Jake L. Hamon, J. S. Mullen and F. M. Adams, all residents of Ardmore, Carter County, Eastern District of Oklahoma; against E. L. McCain, a resident of Pawhuska, Osage County, Oklahoma; against the Bull Head Oil Company, a corporation, organized under the laws of the State of Oklahoma, and having its principal place of business at Ardmore, Oklahoma, with defendant Errett Dunlap as its president and with defendant T. H. Dunn as its secretary from the date of its organization in January, 1914, and against the First National Bank of Ardmore, a corporation doing business at Ardmore in the Eastern District of Oklahoma. For cause of action, plaintiff says:

I.

That Allie Daney is a female, under the age of 18 years, and is enrolled as a full-blood citizen of the Choctaw Nation opposite Roll number N. B. 1365 of the approved rolls of that Nation; that as such Choctaw Indian there was allotted and patented to her, among others, the following lands, to-wit:

The South half of the Northwest quarter of the Southwest quarter, and West half of the Southwest quarter of the Southwest quarter of Section Four (4), Township Four (4) South, Range three (3) West, located in Carter County, Eastern District of Oklahoma, and containing 40 acres, more or less, for convenience and brevity herein-after referred to as the Daney 40 acres.

II.

That the lands so allotted and patented, described in paragraph No. 1, is reserved by law from alienation and encumbrance, and has not been at any time, and is not now, subject to alienation or encumbrance by the allottee or any other person, except by and with the consent of the Secretary of the Interior. That the proceeds of oil and gas produced from said premises as hereinafter set forth is also reserved by law from alienation and incumbrance by said allottee or her guardian, and that funds derived from the sale thereof are by law required to be deposited in the office of the Superintendent for the Five Civilized Tribes for the use and benefit of said allottee.

III.

That said minor, Allie Daney, was born, reared and has resided practically all her life near Talihina, in that part of the central district of the Indian Territory, now embraced within LeFlore County, Oklahoma, and that she never resided elsewhere prior to the year 1918.

That on or about November 8, 1905, the United States Court for the Southern District of the Indian Territory, sitting in probate, appointed J. J. Eaves as curator of the estate of said Allie Daney, and that after the admission of the State of Oklahoma into the Union said curatorship cause was transferred to the County Court of Love County, Oklahoma.

Plaintiff alleges that because said minor was never a resident of the Southern District of the Indian Territory, the order appointing said J. J. Eaves curator was invalid for want of jurisdiction; should this court not so hold, plaintiff alleges that all authority of said J. J. Eaves as curator was terminated upon the admission of Oklahoma into the Union, because the laws simultaneously put into force in Oklahoma, and particularly laws then in force and enacted in 1908 relative to minor Indians, did away with the office of curator and created in place thereof the office of guardian.

IV.

That on July 24, 1911, A. N. Thomas was by order of the County Court of LeFlore County, Oklahoma, appointed guardian of the person and estate of said Allie Daney, and that he immediately qualified and entered upon the discharge of his official duties, and that he is now such guardian.

V.

That on or about day of February, 1914, there was recorded in the office of the county clerk of Carter County, Oklahoma, in book 21, page 391, a certain instrument in writing dated August 19, 1913, executed by A. N. Thomas as guardian of Allie Daney, allottee aforesaid, purporting to be an oil and gas lease to the defendants T. H. Dunn and J. Robert Gillam, and conveying to them the right to go upon, develop, mine and take therefrom the oil and gas under the Allie Daney 40 acres described in paragraph No. 1 hereof. That said lease is also executed by J. J. Eaves, curator of Allie Daney. A photostat copy of said lease with the endorsements thereon, including approval thereof by the Secretary of the Interior, marked "Exhibit A" is attached hereto and made a part hereof. For convenience and brevity said lease is hereafter referred to as the A. N. Thomas lease.

UNITED STATES *vs.* T. H. DUNN, ET AL.

That on the day of, 1914, there was recorded in the office of said county clerk in book 21, page 392, an instrument in writing dated the 28th day of January, 1914, executed by defendants T. H. Dunn and J. Robert Gillam, purporting to be an assignment to the defendant Bull Head Oil Company of said oil and gas lease in this paragraph described. A photostat copy of said assignment, marked "Exhibit B" is attached hereto and made a part hereof.

VI.

That defendants T. H. Dunn and J. Robert Gillam entered into possession of said premises under the terms of said oil and gas lease and began the development thereof; that upon assignment of said lease as in paragraph V alleged, defendant Bull Head Oil Company entered into possession of said premises and continued the development thereof, taking therefrom oil and gas in large quantities, but plaintiff alleges that said oil and gas lease was illegal, fraudulent and void for the reasons hereinafter stated:

(a) A short time before the execution of said lease, what is known as the Healdton oil field was discovered and the first producing oil well in said field has been drilled at a point near the lands in paragraph No. 1 described, and that said first oil well proved and demonstrated that the lands described in paragraph No. 1 were within the radius of probable, if not certain, oil territory, and that the same were valuable for oil and gas purposes; that the completion of said first oil well on, to-wit: August 7, 1913, created an immediate demand for oil and gas leases in that vicinity and that the lease upon the lands in paragraph No. 1 described could have been sold for a large and valuable bonus or cash payment in addition to the customary rentals and royalties provided for by the lease above described; that after the discovery of oil in the Healdton field, as above recited, one A. N. Funkhouser began negotiations with A. N. Thomas, as guardian of Allie Daney, for an oil and gas lease on the lands in paragraph No. 1 described, and that said Funkhouser went to Ardmore, Oklahoma, where defendant T. H. Dunn and J. Robert Gillam resided, and made and entered into a verbal agreement with them whereby they employed said Funkhouser to procure an oil and gas lease on said premises, same to be taken in the name of T. H. Dunn and J. Robert Gillam, who were to hold an undivided one-half interest therein for themselves, the other half interest to be held for the use and benefit of and subject to the orders of said Funkhouser.

(b) That shortly thereafter, said Funkhouser, T. H. Dunn and J. Robert Gillam renewed the negotiations for the purchase of said oil and gas lease from said guardian of Allie

Daney, and in said negotiations said Funkhouser acted as agent, attorney, partner and associate of said T. H. Dunn and J. Robert Gillam, and the said J. Robert Gillam ratified, confirmed and received the benefits of all things done by his associate T. H. Dunn, and by the said A. N. Funkhouser as their attorney, agent, associate and partner in procuring said oil and gas lease.

(c) That about the time of the discovery of said Healdton oil field, or immediatly thereafter, Earl McGowan, a resident of Talihina, Oklahoma, and a relative by marriage of A. N. Thomas, applied to said A. N. Thomas, as guardian of Allie Daney, to purchase an oil and gas lease on the lands in paragraph No. 1 described, and secured from said guardian a verbal option or agreement for the oil and gas lease on said premises, and further had some sort of understanding or agreement with said guardian by which said McGowan was to have the preference in the matter of leasing said premises for oil and gas purposes; and it was understood and agreed that in the event said McGowan secured said lease he was to hold an undivided one-half interest therein secretly for the use and benefit of said A. N. Thomas personally and individually; that said tentative and verbal agreement between the said Earl McGowan and A. N. Thomas, the guardian, was not finally carried into execuution for the reason that said A. N. Funkhouser, acting as aforesaid for himself and said T. H. Dunn and J. Robert Gillam, became informed thereof, and induced the said Earl McGowan to withdraw his application and cease his efforts to procure a lease, and in consideration thereof agreed to procure, and did procure, for said McGowan an interest hereinafter described in the said A. N. Thomas lease; that during the course of the negotiations for said lease between the said guardian and the said Funkhouser, acting for himself and as agent and associate aforesaid, the defendant T. H. Dunn appeared upon the scene at Talihina, Oklahoma, and he and the said J. Robert Gillam in conjunction with said Funkhouser actively participated in the negotiations for said lease, said negotiations resulting in the execution of the lease described in paragraph No. V hereof, and in the agreement set forth in the following subdivision of this paragraph.

(d) That as a part of the agreement resulting in the execuution of said lease, it was understood that same was to be taken in the name of T. H. Dunn and J. Robert Gillam; that A. N. Funkhouser, Earl McGowan and one D. Thomas, uncle of A. N. Thomas, were to have and own jointly an undivided one-fourth interest therein, and this part of said agreement was reduced to writing and signed by A. N. Funkhouser, Earl McGowan and D. Thomas on the one side, and T. H. Dunn

and J. Robert Gillam on the other; that said written portion of said agreement was subsequently assigned to the defendant E. L. McCain and by him placed of record in the office of the county clerk of Carter County, Oklahoma, in book, page, a true copy of which is hereto attached, marked "Exhibit C" and made a part hereof. The verbal part of said agreement further provided that the guardian, A. N. Thomas, should have and own personally and for his private and individual use and benefit, an undivided one-fourth interest in the lease described in paragraph No. V hereof, same being covered up and secretly held and carried in the name of J. J. Thomas of Talihina, Oklahoma, who is the father of the guardian A. N. Thomas; said T. H. Dunn and J. Robert Gillam were to have and hold the remaining one-half interest in said lease. It was further agreed that T. H. Dunn and J. Robert Gillam would cause to be chartered and organized under the laws of Oklahoma, a corporation with \$18,000.00 capital stock, to be known as the Bull Head Oil Company, and to which, upon organization, said lease should be assigned; and that thereupon one-fourth of the capital stock of said corporation should be issued to J. J. Thomas for the sole use and benefit of the guardian A. N. Thomas; that one-half of said capital stock should be issued to T. H. Dunn and J. Robert Gillam, and one-fourth of said stock should be issued to said A. N. Funkhouser, D. Thomas and Earl McGowan. Plaintiff alleges that said Earl McGowan neither paid nor agreed to pay any consideration to the guardian or his ward for the interest which he was to receive in said lease and in the capital stock of said corporation other than his agreement with the said A. N. Thomas and said A. N. Funkhouser to withdraw his application in favor of Funkhouser for an oil and gas lease on said lands and cease his efforts to secure such lease as hereinabove alleged; that D. Thomas neither paid nor agreed to pay any consideration whatever for his interest in said lease or in the capital stock of said corporation; that neither J. J. Thomas nor A. N. Thomas paid or agreed to pay any consideration to Allie Daney for the interest which they were to have in said lease and in the capital stock of said corporation; and plaintiff alleges that said agreement between A. N. Thomas, A. N. Funkhouser, T. H. Dunn, J. Robert Gillam, J. J. Thomas, Earl McGowan and D. Thomas was illegal and fraudulent, and was made for the purpose of cheating and defrauding the said Allie Daney of her rights in said premises, and that the written portion thereof shown by "Exhibit C" should be cancelled of record. For convenience and brevity the agreement partly written and partly verbal in this paragraph VI-d alleged is hereinafter referred to as the Funkhouser agreement.

VII.

Plaintiff alleges that as a part of the negotiations and agreement resulting in the execution of the lease described in paragraph No. V hereof, it was further agreed by all parties above mentioned that application should be made to the judge of the county court of LeFlore County, Oklahoma, for an order to sell said lease to T. H. Dunn and J. Robert Gillam, and for an order approving the sale thereof, but that the said county judge and county court should not be apprised and informed of the terms, conditions and provisions of said agreement or the secret interests which said Funkhouser, McGowan, A. N. Thomas, J. J. Thomas and D. Thomas were to have and hold in said lease and in the capital stock of said corporation after organization thereof as above alleged; that accordingly T. H. Dunn and A. N. Thomas made application to the county judge of LeFlore County, Oklahoma, for authority to said guardian to make an oil and gas lease to T. H. Dunn and J. Robert Gillam covering the said Allie Daney 40 acres; that said county judge and county court authorized said guardian to make said lease, and on the same day and after the execution thereof, made an order approving said lease, being the lease described in paragraph V hereof; that, in granting authority for the execution of said lease and in approving the same, the county judge and the county court of LeFlore county were wholly uninformed as to the secret agreement by which the above named parties were to have and hold an interest in said lease and in the capital stock of said corporation as in said Funkhouser agreement alleged; but all such information was concealed and withheld by the defendants from the county judge and county court; and plaintiff alleges that the concealment thereof constituted a fraud upon said county court and county judge which renders the action of said court authorizing the execution of said lease and the approval thereof illegal and void.

VIII.

That after the execution of the lease shown in paragraph No. V hereof, and after approval thereof by the county court of LeFlore County, as above alleged, said lessor A. N. Thomas, as guardian of Allie Daney, and said lessees J. Robert Gillam and T. H. Dunn presented the lease to Dana H. Kelsey, United States Indian Superintendent at Muskogee, Oklahoma, for his consideration and recommendation and for the purpose of having same approved by the Secretary of the Interior upon recommendation of said Kelsey; that, on January 31, 1914, said Kelsey, in his official capacity, forwarded said lease to the Secretary of the Interior with recommendation that same be approved, and acting thereon, same was approved by the Secretary of the Interior on February 3, 1914. But plaintiff

UNITED STATES *vs.* T. H. DUNN, ET AL.

alleges that such approval by the Secretary of the Interior was illegal and void for the reasons, to-wit:

(a) That neither the said Superintendent Kelsey nor the Secretary of the Interior were informed or advised of the fraud perpetrated upon the county judge and county court of LeFlore County, Oklahoma, by the concealment of material facts as in paragraph VII hereof alleged in securing authority to lease and in securing approval of said lease by said county court, a valid order duly and regularly entered approving said lease being a prerequisite to favorable action upon the lease by the said Superintendent and Secretary of the Interior; but that said lessor and lessees purposely and intentionally withheld from said Superintendent and from said Secretary of the Interior all knowledge of the unfair and fraudulent means employed to secure court action authorizing and approving said lease.

(b) That all facts and circumstances concerning said secret agreement and secret interest to be held by and on behalf of A. N. Thomas, Earl McGowan, D. Thomas and J. J. Thomas, were concealed and withheld from said Superintendent, Dana H. Kelsey, and from the Secretary of the Interior; that as a part of their application for the approval of said oil and gas lease and in conformity with the rules and regulations of the Secretary of the Interior, said T. H. Dunn and J. Robert Gil-lam made under oath, among others, the following statement:

“The applicant solemnly swears that the lease, for which approval is requested, is taken in good faith in the interest and for the exclusive benefit of the applicant, and not for speculation or transfer, or as agent for, or in the interest or for the benefit of, any other person, corporation or association; that no other person, corporation, or association has any interest, present or prospective, directly or indirectly, therein.”

That said Superintendent Kelsey, not being otherwise informed, believed these statements under oath, and acting thereon, recommended approval of said lease, and that the Secretary of the Interior and his assistant, Lewis C. Laylen, not being otherwise informed, believed said statements under oath and relying thereon, approved said lease. Plaintiff alleges that the concealment, by T. H. Dunn and J. Robert Gil-lam from the said Superintendent Kelsey and from the Secretary of the Interior, of the fact of said Funkhouser agreement alleged in paragraph VI-d hereof, and the making under oath of the statement above quoted, constituted a fraud upon said Superintendent and upon the said Secretary of the Interior and rendered the approval of said lease illegal and void.

IX.

Plaintiff alleges that but for the secret and fraudulent Funkhouser agreement recited and set forth in paragraph No. VI-d hereof, and but for the concealment of the facts of such agreement from the said county judge and county court of LeFlore County, and from said Superintendent and said Secretary of the Interior, a much more valuable lease could have been procured for the use and benefit of said Allie Daney, and that one responsible oil operator then stood ready and willing to pay \$10,000.00 by way of bonus for an oil and gas lease on the lands in paragraph No. I described.

X.

That pursuant to the agreement set forth in paragraph No. VI-d hereof, T. H. Dunn and J. Robert Gillam caused a corporation, known as the Bull Head Oil Company, to be organized under the laws of Oklahoma with a capital stock of \$18,000.00, which corporation is defendant herein; that T. H. Dunn, J. Robert Gillam, L. S. Dolman, Errett Dunlap and J. S. Mullen were the incorporators and directors thereof, and that each and all were at the time of the organization of said corporation fully aware of said secret agreement set forth in paragraph No. VI-d hereof, and were informed of all the facts and circumstances connected therewith. That during most of the negotiations which resulted in the execution of said lease, approval thereof by the county court, and the recommendation and approval by said Superintendent and said Secretary of the Interior, respectively, said L. S. Dolman was attorney for said T. H. Dunn and J. Robert Gillam; that immediately before the execution of said lease, Errett Dunlap, president of said corporation, sent one W. P. Humphrey to Talihina, Oklahoma, to secure an oil and gas lease upon the lands described in paragraph No. I, and that he thereafter kept himself fully advised of the progress of negotiations for a lease from A. N. Thomas as guardian and fully advised of all progress of negotiations on the part of J. S. Mullen, his employer at Ardmore, Oklahoma, for a lease from J. J. Eaves, curator of said Allie Daney, as set forth and alleged in paragraph No. XI hereof; and that said corporation at all times had full notice and knowledge of the secret agreement entered into and the secret interest held and owned by the parties aforesaid in said lease as charged in paragraph No. VI-d hereof; that after assignment of lease was executed, as shown by "Exhibit B," T. H. Dunn and J. Robert Gillam filed same with the United States Indian Superintendent, Dana H. Kelsey, for approval by the Secretary of the Interior, and induced said Superintendent to recommend approval thereof, and induced the Secretary of the Interior to approve the same, but in so doing, said T. H. Dunn,

J. Robert Gillam and the Bull Head Oil Company purposely withheld from said Superintendent and from said Secretary of the Interior, all knowledge, notice or information concerning said Funkhouser agreement, and concerning the secret interest held in said lease and to be held in the capital stock in said corporation, but that said corporation took said assignment with full knowledge of these facts; wherefore, plaintiff charges that as against Allie Daney and this plaintiff, said defendant corporation acquired no rights by said assignment in and to said Allie Daney 40 acres, but that said lease and said assignment thereof constitute a cloud upon the title of said allottee and should be cancelled of record.

XI.

That on the same day, August 19, 1913, that the A. N. Thomas lease described in paragraph No. V was executed, an oil and gas lease was executed by J. J. Eaves of Ardmore, Oklahoma, representing himself to be curator of the estate of said Allie Daney, same being in favor of J. S. Mullen and covering among others, the lands described in paragraph No. I hereof; said lease was filed for approval with the United States Indian Superintendent at Muskogee, Oklahoma, August 23, 1913, resulting in a contest before said Superintendent between J. S. Mullen, on the one side, and T. H. Dunn and J. Robert Gillam on the other, as to which of said leases should be approved. That after the organization of said corporation and about January 30, 1914, the respective lessees effected a compromise agreement touching said contest, as a result of which J. S. Mullen withdrew his application for the approval of the lease of J. J. Eaves, curator, to himself so far as concerned the lands described in paragraph No. I, and induced the said Eaves to attach his signature as curator to the lease described in paragraph No. V, and said Mullen subsequently abandoned entirely the lease of J. J. Eaves, curator, to himself, and requested that same be disapproved by the Secretary of the Interior, which was accordingly done. That no consideration was paid or agreed to be paid to said J. J. Eaves, as curator, for his joining in the execution of said guardianship lease of A. N. Thomas, in paragraph No. V described, and that his signature as such curator to said lease was wholly without effect, illegal and void; but that notwithstanding the void character of such act on the part of said J. J. Eaves, same was made the basis of an agreement on the part of the Bull Head Oil Company, and on the part of T. H. Dunn and J. Robert Gillam, who controlled said corporation, on the one hand, and J. S. Mullen, on the other, whereby 8,000 shares, of the par value of One Dollar per share, of the capital stock of said corporation was to be issued to said J. S.

Mullen and associates, among whom were Jake L. Hamon, F. M. Adams and Errett Dunlap.

XII.

That pursuant to the illegal Funkhouser agreement, set forth in paragraph No. VI-d hereof, and pursuant to the illegal agreement between the Bull Head Oil Company, T. H. Dunn and J. Robert Gillam and J. S. Mullen, set forth in the preceding paragraph, the capital stock of said Bull Head Oil Company was issued as follows:

To J. W. Gladney, 1,000 shares, in consideration of an oil and gas lease to defendant corporation upon 5 acres of land adjoining the land described in paragraph No. I hereof, and being the West half of the Southwest quarter of the Northeast quarter of the Southwest quarter of Section 4, Township 4 South, Range 3 West, for convenience hereinafter referred to as the Gladney lease;

To J. S. Mullen, for himself and associates, 8,000 shares;

To T. H. Dunn, Trustee, 8,000 shares;

To L. S. Dolman, 1,000 shares. Plaintiff alleges that said L. S. Dolman neither paid nor agreed to pay anything for said stock and that he received same with full knowledge of the fraudulent character thereof and that at the time of the issuance thereof, said stock was illegal and void.

That of the stock issued to J. S. Mullen, the following shares were later transferred to his associates, to-wit: To F. M. Adams 1,072 shares, which stock Adams later sold to defendant Don Russell for \$5500; to E. Dunlap, 172 shares; to Jake L. Hamon 1500 shares.

That of the stock issued to T. H. Dunn, trustee, certain shares were later transferred as follows, to-wit: To N. E. Dunn, 1500 shares; to T. H. Dunn, 500 shares; to J. Robert Gillam, 2,000 shares; to Earl McGowan, 666-2/3 shares; to A. N. Funkhouser, 666-2/3 shares; to T. H. Dunn, trustee for D. Thomas, 666-2/3 shares; to T. H. Dunn, trustee for J. J. Thomas and A. N. Thomas, 2,000 shares.

That in the early part of the year 1914, T. H. Dunn and J. Robert Gillam bought 2,000 shares of said capital stock held by T. H. Dunn, trustee for J. J. Thomas and A. N. Thomas, and as consideration therefor, in addition to cash paid and an automobile delivered to said A. N. Thomas, they caused a deed to a tract of 200 acres of land in Carter County, Oklahoma, to be made to P. C. Dings, who secured a loan thereon, the proceeds whereof were paid to said A. N. Thomas, and who

thereafter conveyed the land to J. J. Thomas to be held for said A. N. Thomas.

That J. S. Mullen neither paid nor agreed to pay any consideration for the 8,000 shares issued to him for the benefit of himself and associates other than to induce said J. J. Eaves to join as curator aforesaid in the execution of the A. N. Thomas lease shown by "Exhibit A;" that he took same with full knowledge of the Funkhouser agreement shown in paragraph VI-d and with full knowledge of the deception practiced and perpetrated upon Superintendent Kelsey and upon the Secretary of the Interior, as alleged in paragraph VIII, and that his associates *Jack L. Hamon, Errett Dunlap and F. N. Adams* accepted and received their portion of said capital stock with full knowledge of said Funkhouser agreement and of the deception practiced and perpetrated upon said Federal officials; wherefore, plaintiff alleges that the issuance of said stock and the transfer thereof was wholly illegal and void.

That Earl McGowan neither paid nor agreed to pay any consideration for the 666-2/3 shares of said capital stock issued to him other than to cease his efforts to secure a lease upon said Allie Daney 40 acres as in paragraph VI alleged; that he subsequently, during the year 1914, sold and assigned said stock to defendant *Jake L. Hamon*, who took same with full knowledge of all the facts and circumstances leading to and resulting in the acquisition thereof by said McGowan, and that same in the hands of both McGowan and Hamon was and is illegal and void.

That D. Thomas neither paid nor agreed to pay any consideration for the 666-2/3 shares of said capital stock issued to T. H. Dunn for his use and benefit; that same was a fraudulent gift and donation made by and effected through the influence of Earl McGowan, his son-in-law, and by his nephew A. N. Thomas, as alleged in paragraph VI, and that the issuance of said stock was wholly illegal and void; that said stock was, during the year 1914, either purchased by T. H. Dunn, J. Robert Gillam, or Jake L. Hamon, and plaintiff alleges upon information and belief that said stock is now owned, either by Jake L. Hamon or by T. H. Dunn or N. E. Dunn; that the purchasers and the present holders of said stock took same with full knowledge of the fraudulent circumstances under which it was originally issued, and that the title thereto is illegal and void.

That neither N. E. Dunn, T. H. Dunn nor J. Robert Gillam paid anything for the stock issued to them, and that they took same with full knowledge of the fraudulent circumstances under which it was issued; that from time to time Jake L. Ha-

mon has purchased from the defendants herein large blocks of said stock; that on April 19, 1918, he purchased from J. Robert Gillam and wife, 3,266-2/3 shares of said capital stock, paying, or agreeing to pay, therefor the sum of \$75,000.00.

That 500 shares of the capital stock of said corporation issued to A. N. Funkhouser were later, during the year 1914, sold and transferred to defendant E. L. McCain, who now holds the same; that A. N. Funkhouser originally received said stock with full knowledge of the fraudulent circumstances under which it was issued; that same in his hands and the issuance thereof was illegal and void; and that the defendant E. L. McCain took the assignment of said 500 shares of stock knowing that the same was illegal and void, and with full knowledge of the fraudulent circumstances under which it had been procured by said Funkhouser; and that same in his hands is illegal and void.

That during the year 1914, the 172 shares of stock issued to F. M. Adams were sold and transferred to defendant Don Russell for the sum of, to-wit: \$5500.00, who took same with full knowledge of the fraudulent circumstances under which same were issued.

Plaintiff is unable, for lack of information, to further allege in detail the various persons who have from time to time owned shares of said stock, and the amount thereof; but upon information and belief, plaintiff alleges that all of the defendants herein, except the Bull Head Oil Company, have either owned and sold and transferred or now own shares of said stock.

That the lease on the Allie Daney 40 acres of land and the lease on five acres of adjoining land secured from J. W. Gladney, as aforesaid, constitutes all of the leasehold property of said Bull Head Oil Company, and all income received by said corporation is derived therefrom; that the equipment and expense incident to drilling wells and producing oil and gas has been paid for out of the proceeds derived from the sale of oil and gas; that said five acres adjoining land has produced a limited and inconsiderable portion of the income of said corporation and that income from said two tracts of land has been so commingled as to render a separation thereof impracticable; that said Bull Head Oil Company is now taking large quantities of oil from said Allie Daney forty (40) acres of land and is converting same into cash; that the cash on hand is now on deposit in the First National Bank of Ardmore, Oklahoma, and that such cash, together with funds derived from the sale of oil as the same is produced, provide the only means by which any judgment herein against said corpora-

tion may be satisfied; and that, unless restrained from so doing, the said bank will, upon order of the officers of said corporation, pay out said funds, and said officers will disburse the same, together with the income being derived from the sale of oil and gas as produced, all to the great and irreparable injury and damage of this plaintiff and said allottee.

That each and all of the defendants, except the Bull Head Oil Company, have held stock in said corporation, and that Jake L. Hamon, Errett Dunlap, T. H. Dunn, N. E. Dunn, E. L. McCain, L. S. Dolman, Don Russell, J. S. Mullen and others of the defendants to plaintiff unknown, now hold stock in said corporation; that those defendants who have disposed of their stock or a part thereof, to-wit: F. M. Adams, J. S. Mullen, J. Robert Gillam, Mrs. J. Robert Gillam, and others to plaintiff unknown, received large sums of money therefrom either in the form of dividends paid by the corporation or in the form of proceeds of the sale of said stock to others, or both; that all such moneys were received by each and all of the defendants with full knowledge of the fraudulent character of the lease held by the Bull Head Oil Company, and that they received and now hold the same impressed with a trust in favor of said Allie Daney, and that they should account to this plaintiff for the full amount thereof; that the amount of stock held or formerly held by each of the defendants and the sums of money received thereon are not known to this plaintiff but is peculiarly known to each of the several defendants.

Wherefore the plaintiff prays:

1.

That subpoenas be issued to the defendants and each of them, requiring them to answer this bill and make full discovery of all the matters and things therein alleged within a time spscified;

2.

That the instruments in writing hereinbefore described as Exhibits "A," "B" and "C," and each of them declared null and void and be cancelled of record;

3.

That the allottee, Allie Daney, be decreed to be the owner in fee of the lands described in paragraph No. I, and that the defendants and each of them be decreed to have no right, title or interest in or to said lands or any part thereof, and that they be forever enjoined from asserting any right, title or interest therein;

4.

That the defendants Bull Head Oil Company, T. H. Dunn, N. E. Dunn, Don Russell, J. Robert Gillam, Mrs. J. Robert Gillam, L. S. Dolman, Errett Dunlap, Jake L. Hamon, E. L. McCain, J. S. Mullen and F. M. Adams and each of them be required to account for all oil and gas taken from the said lands and for the money received by them as the proceeds of oil and gas taken from the said lands (and for the money received by them as the proceeds of oil and gas taken from said lands);

5.

That if for any reason the court shall hold that the lease described in paragraph V and shown in "Exhibit A" cannot be cancelled, then plaintiff prays that the defendant stockholders be adjudged the holders of said stock respectively in trust for said Allie Daney, and that Allie Daney be declared the rightful owner thereof and that plaintiff be awarded the custody thereof for her use and benefit; that the defendant, the Bull Head Oil Company, be required to account for all the oil and gas taken from the said premises and for the proceeds thereof; and that the defendants who are or at any time have been stockholders of the Bull Head Oil Company be required to account for all moneys received by them respectively, either as dividends or as proceeds of sales of their stock;

6.

That an order be immediately issued and served on the defendant, the First National Bank of Ardmore, prohibiting it from paying out any moneys on deposit with it to the credit or for the use of the Bull Head Oil Company except on the order of this court, and restraining the Bull Head Oil Company and its officers from disbursing or paying out any moneys or funds on hand or any moneys due or to become due to said corporation, other than the actual necessary current expenses incident to the production, conservation and sale of oil and gas from the lands described in paragraph I, not including in such expenses salaries to its officers, except by order of this court;

7.

That a receiver be forthwith appointed to take charge of all the property and assets of the Bull Head Oil Company and to operate and minister the same under the orders of this court;

8.

That plaintiff have such other and further relief as it may be entitled to in equity and good conscience.

W. P. McGINNIS,
United States Attorney,

L. K. POUNDERS,
Special Assistant to the United
States Attorney,
Counsel for Plaintiff.
LUNSFORD & BULGEN, and
LEDBETTER, STUART,
BELL & LEDBETTER,
Of Counsel.

State of Oklahoma, Muskogee County, ss.

L. K. Pounders, being first duly sworn on oath states that he is one of counsel in the above and foregoing styled cause of action; that before this bill of complaint was drafted he made a full and careful investigation as to the matters therein set forth and alleged and that to the best of his knowledge, information and belief same are true and correct.

L. K. Pounders.

Subscribed and sworn to before me this September 9th, 1919. R. P. Harrison, Clerk, By W. H. Cunningham, Deputy.
(Seal)

Exhibit "A."

Original.

27965

Office of Indian Affairs. Received Feb. 2, 1914. 10984.

Received Union Agency Aug. 22, 1913. No. 45357.

Received Union Agency Jan. 28, 1914. Enclosure No. 5430.

Form A. Series 1908—Approved April 20, 1908.

Amended February 6, and June 29, 1911.

Oil and Gas Mining Lease Upon Land Selected for Allotment,
Chickasaw Nation, Oklahoma.

This Indenture of Lease, Made and entered into in quadruplicate on this 19th day of August A. D. 1913, by and between A. N. Thomas, gdn. of Allie Daney of Talihina, Okla., enrolled as a full blood citizen of the Choctaw Nation, Roll, No. N. B. 1365, party of the first part, hereinafter designated as lessor, and T. H. Dunn and J. Robt. Gillam of Ardmore, Oklahoma, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the act

of Congress approved May 27, 1908 (35 Stat. L., p. 312); Witnesseth:

1. The lessor, for and in consideration of one dollar, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations, and conditions hereinafter contained, and hereby agreed to be paid, observed, and performed by the lessee, does hereby demise, grant, lease, and let unto the lessee, for the term of ten years from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities, all the oil deposits and natural gas in or under the following described tract of land, lying and being within the county of Carter and State of Oklahoma, to-wit: S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ and W $\frac{1}{2}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of section 4, township 4 S., range 3 W. of the Indian Meridian, and containing 40 acres, more or less, with the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil and natural gas, also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to pay or cause to be paid to the United States Indian Superintendent, Union Agency, Muskogee, Oklahoma, for the lessor, as royalty, the sum of 12 $\frac{1}{2}$ per cent. of the gross proceeds of all crude oil extracted from the said land, such payment to be made at the time of sale or removal of the oil. And the lessee shall pay as royalty on each gas producing well three hundred dollars per annum in advance, to be calculated from the date of commencement of utilization: Provided, however, in the case of gas wells of small volume, when the rock pressure is one hundred pounds or less, the parties hereto may, subject to the approval of the Secretary of the Interior, agree upon a royalty, which will become effective as a part of this lease: Provided, further, That in case of gas wells of small volume, or where the wells produce both oil and gas or oil and gas and salt water to such extent that the gas is unfit for ordinary domestic purposes, or where the gas from any well is desired for temporary use in connection with drilling and pumping operations on adjacent or nearby tracts, the lessee shall have the option of paying royalties upon such gas wells of the same percentage of the gross proceeds from the sale of gas from such wells as is paid under the lease for royalty on oil. The lessor shall have

the free use of gas for domestic purposes in his residence on the leased premises, provided there shall be surplus gas produced on said premises over and above enough to fully operate the same. Failure on the part of the lessee to use a gas producing well, which cannot profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain gas producing privileges, the lessee shall pay a rental of one hundred dollars per annum, in advance, calculated from date of discovery of gas, on each gas producing well, gas from which is not marketed or not utilized otherwise than for operations under this lease. Payments of annual gas royalties shall be made within twenty-five days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

3. Until a producing well is completed on said premises the lessee shall pay, or cause to be paid, to the Superintendent, Union Agency, Muskogee, Oklahoma, for lessor, as advance annual royalty, from the date of the approval of this lease, fifteen cents per acre per annum, annually, in advance for the first and second years; thirty cents per acre per annum, annually, in advance, for the third and fourth years; seventy-five cents per acre per annum, annually, in advance, for the fifth year; and one dollar per acre per annum, annually, in advance, for each succeeding year of the term of this lease; it being understood and agreed that such sums of money so paid shall be a credit on stipulated royalties, and the lessee hereby agrees that said advance royalty when paid shall not be refunded to the lessee because of any subsequent surrender or cancellation thereof; nor shall the lessee be relieved from its obligation to pay said advanced royalty annually when it becomes due, by reason of any subsequent surrender or cancellation of this lease.

4. The lessee shall exercise diligence in sinking wells for oil and natural gas on land covered by this lease and shall drill at least one well thereon within one year from the date of the approval of this lease by the Secretary of the Interior, or shall pay to the United States Indian Superintendent, Union Agency, Muskogee, Oklahoma, for the use and benefit of the lessor, for each whole year the completion of such well is delayed after the date of such approval by the Secretary of the Interior, for not to exceed ten years from the date of such approval, in addition to the other considerations named herein, a rental of one dollar per acre, payable annually; and if the lessee shall fail to drill at least one well within any such

yearly period and shall fail to surrender this lease by executing and recording a proper release thereof and otherwise complying with paragraph numbered 7 hereof on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken and held as conclusively evidencing the election and covenant of the lessee to pay the rental of one dollar per acre for such year and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration of fifteen days after it becomes due at the end of any yearly period, during which a well has not been completed as provided herein, shall be a violation of one of the material and substantial terms and conditions of this lease, and be cause for cancellation of such lease under paragraph numbered 9 hereof; but such cancellation shall not in any wise operate to release or relieve the lessee from the covenant and obligation to pay such rental, or any other accrued obligation. The lessee may be required by the Secretary of the Interior, or by such officer as may be designated by him for the purpose, to drill and operate wells to offset wells on adjoining tracts, and within three hundred feet of the dividing line, or in case of gas wells lessee may have the option, in lieu of drilling offset wells, of paying a sum equal to the royalties which would accrue on each well to be offset if said wells had been drilled and were being operated on the land described herein and in accordance with the terms hereof. It is understood and agreed by the parties hereto that offset wells shall be drilled, or royalty paid in lieu of drilling, within ten days after the lessee is notified to do so, and failure to comply with such requirement shall constitute a violation of one of the substantial terms of this lease.

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer none to be committed upon the portion in his occupancy or use, take good care of the same and promptly surrender and return the premises upon the termination of this lease to lessor or to whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted; shall not remove therefrom any buildings or permanent improvements erected thereon during the said term by the said lessee, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, excepting tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the easing of all dry or exhausted wells which shall remain the property of the lessee, and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; and shall not per-

mit any nuisance to be maintained on the premises under lessee's control, nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; shall not use such premises for any other purpose than those authorized in the lease; and before abandoning any well shall securely plug the same so as effectually to shut off all water from the oil-bearing stratum, or in the manner required by the laws of the State of Oklahoma.

6. The lessee shall keep an accurate account of all oil-mining operations, showing the sales, prices, dates, purchases, and the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and all other personal chattels used in operating said property and upon all the unsold oil obtained from the land herein leased, as security for payment of said royalty.

7. The lessee may at any time, by paying to the Indian Superintendent, all amounts then due as provided herein and the further sum of one dollar surrender and cancel this lease and be relieved from all further obligations or liability thereunder; Provided, if this lease has been recorded lessee shall execute a release and record the same in the proper county recording office; Provided, further, in event restrictions are removed from all leased premises, the lessee may surrender all the undeveloped portion thereof, by paying the lessor all amounts then due and the further sum of one dollar, which surrender shall not affect the terms hereof as to each producing well and ten acres of said premises as nearly in square form as possible next contiguous to and surrounding each of said wells and execute and record a cancellation of premises surrendered.

8. This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease: Provided, however, that no regulations made after the approval of this lease, affecting either the length or term of oil and gas leases, the rates of royalty or payment thereunder, or the assignment of leases, shall operate to affect the terms and conditions of this lease.

9. Upon the violation of any of the substantial terms and conditions of this lease the Secretary of the Interior (or lessor, in event restrictions are removed as provided in paragraph 12 hereof) shall have the right, at any time after thirty days' notice to the lessee specifying the terms or conditions violated, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land.

10. Before this lease shall be in force and effect lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, and such further bond or bonds as may be required by said Secretary, conditioned for the performance of this lease, which bond shall be deposited and remain on file in the Indian Office.

11. Assignment of this lease or any interest therein may be made with the approval of the Secretary of the Interior, it being understood that to secure such approval the proposed assignee need only be qualified to hold such a lease under the rules and regulations, and furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the faithful performance of the covenants and conditions of this lease.

12. In event restrictions on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease, and all payments required to be made to the United States Indian Superintendent shall thereafter be made to lessor or the then owner of said lands in person or be deposited to the credit of said lessor or his assigns at the 1st National Bank of Ardmore, Oklahoma, or at such other place as the said lessor or his assigns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease.

13. Each and every clause and covenant in this indenture shall extend to the heirs, executors, administrators, successors and lawful assigns of the parties hereto.

14. In witness whereof, the parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

Attest:

.....

A. N. Thomas Gdn (Seal)
of Allie Daney (Seal)

T. H. Dunn (Seal)

J. Robt. Gillam.

J. J. Eaves,
Curator of Allie Daney.

Two witnesses to execution by lessor: Mac Seeley, P. O. Poteau, Okla. Kyle Fannin, P. O. Poteau, Okla.

Two witnesses to execution by lessee: Mac Seeley, P. O. Poteau, Okla.; Kyle Fannin, P. O. Poteau, Okla.

Witnesses to signature of J. J. Eaves: L. S. Dolman, P. O. Ardmore, Okla. F. M. Adams, P. O. Ardmore, Okla.

State of Oklahoma, County of Carter.

Before me, F. M. Adams, a Notary Public in and for said County and State, on this 26 day of January, 1914, personally appeared J. J. Eaves, Curator of Allie Daney, a minor, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal, the day and year above written.

F. M. Adams, Notary Public.

My Commission expires Jan 11, 1915.

.....as witness, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Sam T. Green, Notary Publ.

(My Commission expires Dec. 26, 1914.)

Department of the Interior, United States Indian Service, Union Agency, Muskogee, Okla., Jan 31, 1914.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be approved to extend to Nov. 16, 1921, during minority of lessor, and as much longer thereafter as oil or gas is found in paying quantities.

Dana H. Kelsey,
United States Indian Superintendent.

Department of the Interior, Office of Indian Affairs, Washington, D. C., Feb 2, 1914.

Respectfully submitted to the Secretary of the Interior, with recommendations that it be approved as recommended.

E. B. Merritt, Acting Commissioner.

Department of the Interior, Washington, D. C., Feb 3, 1914.

Approved as recommended, Lewis C. Laylin, Assistant Secretary of the Interior.

Filed for record this 22 day of August, 1913, at 8:30 o'clock a. m. Dana H. Kelsey, Supt. Union Agency. By James L. Granger, a Cashr.

Advance Royalty Received \$6.00.

State of Oklahoma, County of Muskogee—ss.

Before me, R. G. Wagner, notary public in and for said county and state on this 20th day of August, 1913, personally

appeared T. H. Dunn and J. Robt. Gillam, to me known to be the identical persons who executed the within and foregoing lease and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

R. G. Wagner,

My Commission expires May 19, 1916. Notary Public.

..... as witnesses, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Sam T. Green, Notary Public.

(My commission expires Dec. 26, 1914.)

Department of the Interior, United States Indian Service, Union Agency, Muskogee, Okla., Jan 31, 1914.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be approved to extend to Nov. 16, 1921, during minority of lessor, and as much longer thereafter as oil or gas is found in paying quantities. See my report of even date.

Dana H. Kelsey.

United States Indian Superintendent.

Department of the Interior, Office of Indian Affairs. Washington, D. C., Feb 2, 1914.

Respectfully submitted to the Secretary of the Interior, with recommendations that it be approved as recommended.

E. B. Merritt, Acting Commissioner.

Department of the Interior, Washington, D. C., Feb 3, 1914.

Approved as recommended, Lewis C. Laylin, Assistant Secretary of the Interior.

Filed for record this 22 day of August, 1913, at 8:30 o'clock, a. m. Dana H. Kelsey, Supt. Union Agency. By James L. Granger, a Cashr.

Advance Royalty Received \$6.00.

State of Oklahoma, County of LeFlore—ss.

.... before me, Sam T. Green, Notary Public in and for said county and State, on this 19th day of August, 1913, personally appeared A. N. Thomas, legal guardian of Allie Daney, to me known to be the identical person who executed the within and foregoing lease, by mark, in my presence and in the presence of as witnesses, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Sam T. Green, Notary Public.

(My Commission expires Dec. 26, 1914.)

Department of the Interior, United States Indian Service,
Union Agency, Muskogee, Okla., Jan 31, 1914.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be approved to extend to Nov. 16, 1921, during minority of lessor, and as much longer thereafter as oil or gas is found in paying quantities. See my report of even date. Dana H. Kelsey,

United States Indian Superintendent.

Department of the Interior, Office of Indian Affairs. Washington, D. C., Feb 2, 1914.

Respectfully submitted to the Secretary of the Interior, with recommendation that it be approved as recommended.

E. B. Meritt, Acting Commissioner.

Department of the Interior, Washington, D. C., Feb 3, 1914.

Approved as recommended. Lewis C. Laylin, Assistant Secretary of the Interior.

Filed for record this 22 day of August, 1913, at 8:30 o'clock a. m. Dana H. Kelsey, Supt. Union Ageucy. By James L. Granger, a Cashr.

Advance Royalty Received \$6.00.

Exhibit "B"

Form G.—Series of 1908.—Must be executed in quadruplicate.
Recorded Union Agency, Feb 11 1914. Enclosure No. 9035.

Assignment of Oil and Gas Lease.

Whereas, The Secretary of the Interior has heretofore approved an oil and gas mining lease, dated August 19, 1913, entered into by and between T. H. Dunn and J. Robt. Gillam, lessee, and A. N. Thomas, Guardian, and J. J. Eaves, Curator of Allie Daney, lessor, covering the following-described lands in the Chickasaw Nation, Oklahoma:

The S¹/2 of NW¹/4 of SW¹/4; and W¹/2 of SW¹/4 of SW¹/4 of section 4, Township 4 South, Range 3 West.

Now, Therefore, for and in consideration of Eight Thousand (\$8,000.00) dollars, the receipt of which is hereby acknowledged, the said T. H. Dunn and J. Robt. Gillam, the lessee in the above-described lease, hereby bargains, sells, transfers, assigns, and conveys all their right, title, and interest of the lessee in and to said lease, subject to the approval of the Secretary of the Interior to Bull Head Oil Company. Said assignment to be effective from date of approval hereof by the Secretary of the Interior.

In witness whereof, the said lessee has hereunto set their hand and seal, this 28 day of January, 1914.

T. H. Dunn, J. Robert Gillam.

Acknowledgment of Corporation.

State of County—ss:

Before me, a in and for said county and State, on this day of 191.., personally appeared to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

(My Commission expires 191...)

Acknowledgment of Individual.

State of Oklahoma, County of Carter—ss:

Before me, the undersigned, a Notary Public in and for said county and State, on this 28 day of January, 1913, personally appeared T. H. Dunn and J. Robt. Gillam, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth. Fred G. Ryburn.

(My Commission expires March 1, 1917.)

Acceptance by Assignee.

The assignee in the above and foregoing assignment, made subject to the approval of the Secretary of the Interior, hereby accepts such assignment and agrees to fulfill all the obligations, conditions, and stipulations in said described indenture of lease, when assigned, and the rules and regulations of the Secretary of the Interior applicable thereto, and to furnish proper bond guaranteeing a faithful compliance with said lease and this agreement.

In witness whereof, the said assignee has hereunto set hand and seal this 28th day of Jan., 1914.

(Seal) T. H. Dunn, Sec.
Attest

Bull Head Oil Co.
By E. Dunlap.

Consent of Surety.

The of; surety for on the bond accompanying the lease above described, hereby consents to the assignment and transfer of said lease as above made.....

Dated at this day of, 191...

.....
.....
.....

Department of the Interior, Washington, D. C., Apr 7 1914.

Approved: Subject to the conditions attached to the lease.
Lewis C. Laylin, Assistant Secretary. EBM.

Note—If bond accompanying the original lease is to remain in full force and effect it must be specifically so stated in the consent of the surety company. The consent of the surety company need only be executed on the original copy of the assignment.

1. The lessor, for and in consideration of one dollar, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations, and conditions hereinafter contained, and hereby agreed to be paid, observed, and performed by the lessee, does hereby demise, grant, lease and let

5-154r

Lease No. 27965

Department of the Interior, Washington, D. C. Apr-7 1914

The assignment of this lease by T. H. Dunn and J. Robert Gillam, lessees, to Bull Head Oil Company, subject to the payment of an additional bonus of \$2,000, as provided in the accompanying stipulation is approved, effective only from date of approval, subject to the orders and regulations of this Department now existing or hereafter to be promulgated. The price basis for computation of royalty on oil shall be the market price as ascertained and declared by the Secretary of the Interior, and the royalty shall be 12½ per cent on such price basis.

Lewis C. Laylin,
Assistant Secretary. EBM

Exhibit "C."

Know all men by these presents, That, I, A. M. Funkhouser for and in consideration of the sum of Two Hundred Dollars (\$200.00), One Hundred Dollars (\$100.00) of which is paid to me in cash by E. L. McCain receipt whereof is hereby acknowledged, and One Hundred Dollars (\$100.00) to be paid to me in case oil is struck on the within described lease or this interest in the same is sold for cash, but no further payment to be made herein unless oil is struck or this interest is realized on in cash, has sold, assigned, transferred and set over and by these presents do sell, assign, transfer and set over to E. L. McCain, his executors, administrators, successors and assigns, an undivided one-half interest in and to

his interest in the lease and leasehold estate therein created in and to the following described real estate, to-wit:

S2 of NW² of SW4; and W2 of SW4 of SW4 of Section 4, Twp. 4 South, Range 3 West, containing in all 40 acres, the same being situated in Carter County, Okla. by the following agreement for lease, a copy of which is as follows:

"This agreement made and entered into this 18th day of August, 1913, by and between T. H. Dunn and J. Robert Gillam parties of the first part, and D. Thomas, A. M. Funkhouser and E. A. McGowan parties of the second part,

Witnesseth, That for and in consideration of the legal and other services rendered by said parties of the first part in assisting and securing for said parties of the first part in assisting and securing for said parties of the first part a lease contract on the following described real estate, to-wit:

S2 of NE4 of SW; and W2 of SW4 of SW4 of Section 4, Twp. 4 South, Range 3 West containing in all 40 acres.

For mineral, oil and gas purposes, said parties of the first part agree and bind themselves jointly and severally to keep and hold for the sole and exclusive benefit of the said parties of the second part one full fourth interest in and to the said above described lease contract guaranteeing to said parties of the second part one-fourth of any and all the net proceeds and profits which may accrue to said first parties from the said above described lease contract, and that no sale or transfer of the said *least* contract or any part thereof shall be made by the said parties of the first part without the written consent of each and all of the said parties of the second part.

In Witness Whereof, The parties to this contract have hereunto set their hands the day and year last above mentioned. Dunn & Gillam, by T. H. Dunn.

To have and to hold unto the said E. L. McCain, his executors, administrators, successors and assigns, subject to the terms of this said agreement for lease forever.

In witness whereof, I have hereunto set my hand this 5th day of February, 1914. A. M. Funkhouser.

Witness: L. C. Conwell.

State of Oklahoma, Osage County, ss.

Before me, Leon F. Roberts, a notary public in and for said county and state, on this 5th day of February, 1914, personally appeared A. M. Funkhouser, personally known to me to be the identical person who executed the within and fore-

going instrument and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth. Leon F. Roberts, Notary Public (Seal) My commission expires 6-4-1915.

Filed for record at Ardmore, Oklahoma, Feb. 11, 1914, at 5 P. M. W. B. Frame, Register of Deeds, Carter County, Oklahoma.

Filed Sept. 9, 1919, W. V. McClure, Clerk.

Joint and Separate Answers of the Defendants Bull Head Oil Company, a Corporation, Don Russell, J. S. Mullen, Errett Dunlap, Jake L. Hamon and F. M. Adams, to the Bill of Complaint Filed Against Them and Others in the Above Styled Cause.

Come now the defendants Bull Head Oil Company, a corporation, Don Russell, J. S. Mullen, Errett Dunlap, Jake L. Hamon and F. M. Adams and for answer to the plaintiff's bill of complaint say:

First Paragraph.

The defendants say that the plaintiff's bill states no cause of action in behalf of the plaintiff against the defendants in that the allegations of the bill show that the plaintiff has no capacity to maintain this suit to set aside the said oil lease on account of the matters and things alleged in the bill, and they therefore pray that the bill be dismissed.

Second Paragraph.

For defense in their behalf defendants say that they deny that Allie Daney, for and on whose behalf this suit purports to be commenced and prosecuted, was under the age of eighteen years at the time this action was commenced, but they admit that said Allie Daney was a minor less than eighteen years of age during the years 1914, 1915, 1916 and 1917; admit that said Allie Daney is a full-blood Choctaw Indian and enrolled as such on the approved rolls made up by the Interior Department of the citizens of the Choctaw Nation; admit that the forty acres of land described in plaintiff's bill was set apart to and allotted to said Allie Daney as a part of her allotment in the Choctaw Nation and that a patent was duly issued, executed and recorded to her conferring the legal title in her long before any of the transactions mentioned in the bill took place; deny that Allie Daney was born, reared and resided practically all her life near Talihina, for-

merly in that part of the Central District of Indian Territory and now embraced within LeFlore County, Oklahoma, and deny that she never resided elsewhere prior to the year 1918; admit that on or about November 8, 1905, one J. J. Eaves was appointed curator of the estate of said Allie Daney by the United States Court for the Southern District of Indian Territory, and admit that upon the admission of Oklahoma as a state into the Union said curator cause was transferred to the County Court of Love County, Oklahoma, and in this connection these defendants aver and plead that upon the admission of Oklahoma as a state the County Court of Love County, Oklahoma, succeeded to the jurisdiction over the curatorship of J. J. Eaves, curator, and they aver and plead that said curatorship, J. J. Eaves, curator, remained in said County Court of Love County, Oklahoma, until after the execution of the oil and gas mining lease shown by "Exhibit A" to plaintiff's bill and after its approval by the Secretary of the Interior, and they aver and plead that said J. J. Eaves executed said oil and gas mining lease shown by "Exhibit A" to plaintiff's bill under the orders and direction of the County Court of Love County, Oklahoma, which said County Court duly approved said lease and thereby imparted validity to the same; defendants deny that said Allie Daney was never a resident of the Southern District of Indian Territory and deny that she did not have her domicile within the limits of the United States Court District known as the Southern District of Indian Territory, and deny that the said order of the United States Court for the Southern District of Indian Territory was invalid for want of jurisdiction or any other cause, and deny that said J. J. Eaves was not legally appointed her curator and curator of her estate, and deny that the curatorship of said J. J. Eaves terminated upon the admission of Oklahoma into the Union as a state, and deny that there was no authority under the constitution and laws of Oklahoma for continuation of said curatorship after Oklahoma was admitted as a state, and deny that the office of curatorship did not continue from the date of the appointment of J. J. Eaves by the United States Court for the Southern District of Indian Territory after the admission of Oklahoma as a state and during all the time mentioned in plaintiff's bill; admit that on July 24, 1911, A. N. Thomas was by the order of the County Court of LeFlore County, Oklahoma, appointed guardian of the person and estate of the said Allie Daney, and admit that said Thomas qualified as such guardian and entered upon the discharge of his duties, but in this connection these defendants aver and plead that the County Court of LeFlore County at that time had no authority to appoint said Thomas guardian of the estate of said Allie Daney because she had a cura-

tor in the person of said J. J. Eaves appointed and acting as such by legal authority as heretofore stated; defendants aver and plead that said A. N. Thomas as such guardian had no power or authority to lease the said land of said Allie Daney for oil and gas purposes at the time he undertook to make said lease and aver and plead that the County Court of LeFlore County had no jurisdiction over the property of said Allie Daney by virtue of said A. N. Thomas being guardian at any time during the month of August, 1913; defendants admit that there was filed for record in the office of the Register of Deeds of Carter County, Oklahoma, on February 11, 1914, and recorded that certain instrument, a copy of which has been set out as "Exhibit C" to plaintiff's bill, but these defendants aver and plead that they had no notice, knowledge or information of the contents of said "Exhibit C" or the original paper shown to be on record in the office of the Register of Deeds of Carter County, and say that they were not chargeable with constructive notice of such contract if there ever was such a contract entered into between the parties, and these defendants further state that they are without knowledge of the supposed contract purporting to have been set out and disclosed by the original of "Exhibit C" to plaintiff's bill; defendants admit that on August 19, 1913, A. N. Thomas, as guardian of Allie Daney, executed an oil and gas mining lease to defendant T. H. Dunn and J. Robert Gillam conveying to them the right to explore said forty acres of land for oil and gas purposes, and admit that said lease was executed by J. J. Eaves as curator of Allie Daney, and admit that said lease was ordered and approved by the County Court of LeFlore County, Oklahoma; admit that said lease was on the form prescribed by the Secretary of the Interior for leasing allotments of Choctaw Indians for oil and gas purposes and admit that said lease was subsequently approved by the Secretary of the Interior as shown by the copy thereof set forth in "Exhibit B" to plaintiff's bill; defendants deny that T. H. Dunn and J. Robert Gillam ever entered into possession of said premises under the terms of said oil and gas mining lease and began development of the same for oil and gas but say that said lease was assigned to the Bull Head Oil Company and the Bull Head Oil Company entered into possession of said forty acres and developed the same for oil and gas purposes; it is admitted that shortly before August 19, 1913, an oil well had been drilled in what subsequently developed into the Healdton oil field in Carter County, but they deny that said oil well was near the forty acres of land in question, and deny that it demonstrated that said land was valuable for oil and gas, and deny that an oil lease could have been sold on the forty acres of Allie Daney on the 19th of Au-

gust, 1913, for any greater bonus or cash payment in addition to the customary royalty than was paid by said Dunn and Gillam for the execution and delivery of said lease to them; admit that after the discovery of oil in the Healdton field one A. N. Funkhouser began negotiations with A. N. Thomas, as guardian of Allie Daney, for an oil lease on the forty acres of land and admit said Funkhouser went to Ardmore, where the defendants Dunn and Gillam resided, and made a verbal agreement with them about such prospective lease, but defendants deny that Dunn and Gillam employed Funkhouser as their agent to obtain such oil and gas lease from A. N. Thomas, guardian, for a compensation of a half interest therein or any other share therefor, but defendants say that said Funkhouser approached said Dunn and Gillam at Ardmore and represented to them that he believed he could get an oil lease on said land for himself for a cash bonus of \$1.75 per acre, and it was agreed between said Dunn and Gillam on the one hand and Funkhouser on the other, as these defendants are now informed and believe and therefore aver the fact to be, that if Funkhouser would obtain said lease that Dunn and Gillam would pay the cash bonus therefor of \$1.75 per acre and acquire a one-half interest in said lease—that is said Dunn and Gillam were to have an undivided half interest in said lease and Funkhouser was to have the other half interest in said lease; defendants admit that the lease was executed by the guardian to T. H. Dunn and J. Robert Gillam as lessees with an understanding between Dunn and Gillam on the one hand and Funkhouser on the other that Funkhouser was to have an undivided half interest in the lease for himself, but these defendants deny that there was any agreement whatever between said Dunn and Gillam and said Funkhouser or between said Dunn and Gillam on the one hand and said Funkhouser, A. N. Thomas, J. J. Thomas, D. Thomas and Earl McGowan on the other hand or any of them that Dunn and Gillam were to organize or cause to be organized a corporation to hold the title to said lease and that said Funkhouser and said D. Thomas, A. N. Thomas, J. J. Thomas and Earl McGowan should have a part of the stock issued to them or issued to T. H. Dunn or any other person in trust for them or either of them; these defendants state that they are without knowledge of the truth or falsity of the allegation in plaintiff's bill that there was an understanding between A. N. Thomas, guardian of Allie Daney, and Earl McGowan whereby Earl McGowan was to get a lease for oil and gas purposes from said Thomas, guardian, on said forty acres and hold an interest in secret trust for said A. N. Thomas personally and individually, and these defendants say that they are without any knowledge as to the truth or falsity of the allegation in

the plaintiff's bill that T. H. Dunn and J. Robert Gillam, acting through A. N. Funkhouser, prevailed upon *Elmer McGowan* to withdraw his application for a lease upon said land; defendants deny that at any time before or on August 19, 1913, there was any agreement verbal or written between T. H. Dunn and J. Robert Gillam on the one hand and Earl McGowan, D. Thomas, A. N. Thomas and J. J. Thomas on the other hand that either of said latter named parties was to have an interest in said lease and that the same was to be held in trust for them, but defendants admit, upon information and belief, that there was such agreement entered into between A. N. Funkhouser and A. N. Thomas, D. Thomas, Earl McGowan and J. J. Thomas whereby it was agreed that said A. N. Thomas was to have an undivided one-fourth interest in said lease, and in this connection these defendants deny that at the time said lease was executed by A. N. Thomas and at the time it was approved by the County Court of LeFlore County, there was any agreement of any kind or character between said Dunn and Gillam on the one hand and said Funkhouser, D. Thomas, Earl McGowan, A. N. Thomas and J. J. Thomas on the other hand, or between any of said parties, that a corporation was to be organized to take over said lease and own and operate the same for oil and gas purposes, and deny that the County Court of LeFlore County was prevailed upon to approve said lease with any such alleged secret agreement outstanding between the parties; defendants deny that at the time said lease was executed by A. N. Thomas, guardian, to said Dunn and Gillam, and at the time it was approved by the County Court of LeFlore County, there was any responsible oil operator then ready and willing to pay \$10,000 cash bonus for a similar oil and gas lease on said forty acres; it is denied that the Bull Head Oil Company was organized pursuant to any agreement alleged and set forth in plaintiff's bill, but was organized and its stock distributed among the stockholders in accordance with the allegations of fact hereinafter set forth; defendants deny that either L. S. Dolman, Errett Dunlap, J. S. Mullen, F. M. Adams or Jake L. Hamon had any notice, knowledge or information of any kind or character at the time the Bull Head Oil Company was organized and they became stockholders that there was any agreement between said Dunn and Gillam on the one hand and A. N. Funkhouser on the other, or between said Dunn and Gillam on the one hand and said A. N. Funkhouser, A. N. Thomas, J. J. Thomas, D. Thomas and Earl McGowan on the other hand, whereby A. N. Thomas or D. Thomas or J. J. Thomas or Earl McGowan was to have any secret interest in said lease executed by A. N. Thomas as guardian of Allie Daney to said Dunn and Gillam, or to have any interest of any kind or char-

acter therein, and these said defendants at the time aforesaid had no notice, knowledge or information of any kind or character of any of the facts and circumstances alleged in the plaintiff's bill as shown or tending to show that said lease was obtained by either actual or constructive fraud or that there was any suppression of fact or fraudulent misrepresentation or concealment or fraudulent acts whereby the Honorable Dana H. Kelsey, United States Indian Superintendent, was prevailed upon to recommend to the Secretary of the Interior the approval of said lease, nor did these defendants have any knowledge, notice or information of any kind or character either actual or constructive of any of the alleged fraudulent acts charged against said Dunn and Gillam and others whereby the Secretary of the Interior was kept ignorant of the facts and by the aforesaid fraudulent methods prevailed upon to approve said lease; each of these defendants now answering denies that at the time the Bull Head Oil Company was organized and at the time they put their money into the enterprise and became stockholders they had any information, notice or knowledge of any kind or character, either actual or constructive, that T. H. Dunn and J. Robert Gillam, lessees, had entered into any agreement with Funkhouser or A. N. Thomas or J. J. Thomas or D. Thomas or Earl McGowan whereby said parties or either of them were to have any interest in said lease, and, while defendants admit that L. S. Dolman was attorney for T. H. Dunn and J. Robert Gillam, they say he was attorney for them in the contest before the Interior Department arising over the question as to which lease the Department would approve, that is the lease executed to J. S. Mullen by J. J. Eaves, curator, or the lease executed by A. N. Thomas, guardian, to Dunn and Gillam, and these defendants say that said L. S. Dolman had no notice, knowledge or information of any kind or character either actual or constructive of the alleged fraudulent agreements entered into between the said Dunn and Gillam on the one hand and said Funkhouser, A. N. Thomas, J. J. Thomas, D. Thomas and Earl McGowan on the other hand; defendants deny that there was no consideration paid to J. J. Eaves, curator, for his execution of the lease as curator, and these defendants deny that said L. S. Dolman paid no consideration for his 1,000 shares of stock in the Bull Head Oil Company and deny that J. S. Mullen paid no consideration for the 8,000 shares passing to him; defendants admit that there was 2,000 shares issued to T. H. Dunn, trustee, and that said Dunn held said 2,000 shares in trust for J. J. Thomas and that J. J. Thomas in turn was holding 2,000 shares, or the greater part thereof, for the use and benefit of A. N. Thomas, as defendants admit that T. H. Dunn was holding 666-2/3 shares in

trust for Earl McGowan and 666-2/3 shares in trust for A. N. Funkhouser and 666-2/3 shares in trust for D. Thomas; admit that defendant J. Robert Gillam purchased from J. J. Thomas the 2,000 shares held in the name of T. H. Dunn, trustee, but just what consideration said Gillam paid for said shares these defendants do not know and are therefore without knowledge except from hearsay; defendants admit that Jake L. Hamon purchased the 800 shares from Earl McGowan and in this connection defendants aver and plead that said Hamon paid a valuable consideration for said 800 shares, to-wit the sum of \$10,000.00 and aver that at the time said Hamon purchased the said stock and paid the consideration therefor he was without any notice, knowledge or information either actual or constructive of any of the facts and circumstances showing that said McGowan had obtained said stock without consideration or by any fraudulent means or methods or that said McGowan had obtained said stock in the manner and form charged in plaintiff's bill, or that said Earl McGowan obtained said stock by the methods and means and acts and conduct set forth in plaintiff's bill or by any fraudulent methods or means; defendants deny that said T. H. Dunn and J. Robert Gillam never paid anything for the 4,000 shares of stock they got in the Bull Head Oil Company; defendants admit that F. M. Adams sold and transferred to the defendant Don Russell 1072 shares of stock in the Bull Head Oil Company for a cash consideration of \$5500.00, but they aver that said Don Russell had no notice or knowledge of any kind or character either actual or constructive at the time he contracted for said stock, and at the time he paid the consideration therefor, that said Adams had obtained said stock by any fraudulent means or for no consideration, and these defendants aver and plead that said Don Russell purchased said stock from said F. M. Adams and paid the consideration therefor without any notice or knowledge of any kind or character of any of the facts and circumstances set out in plaintiff's bill showing or tending to show that said lease was obtained from A. N. Thomas by fraud either actual or constructive, or that the Secretary of the Interior had been prevailed upon to approve said lease by any fraudulent means or methods or by any of the acts, deeds and conduct specified and set forth in plaintiff's bill.

Third Paragraph.

For further defense in their behalf defendants aver and plead that on or about the 19th day of August, 1913, the said J. J. Eaves, purporting to be the legal curator of and for said Allie Daney, entered into an oil and gas mining lease on the forty acres of land described in plaintiff's bill and likewise

described in Exhibit A thereto, with J. S. Mullen, of Ardmore, Oklahoma, for a valuable consideration paid by said Mullen, said lease being made under the orders and directions of the County Court of Love County, Oklahoma, said County Court of Love County being the successor to the United States Court for the Southern District of the Indian Territory, the Court appointing said J. J. Eaves curator of and for said Allie Daney; that said lease was executed by said J. J. Eaves on the form prescribed by the Secretary of the Interior to be used in leasing the lands of full blood Choctaw Indians for oil and gas purposes, and was executed under the orders of said County Court of Love County, and duly approved by the County Court of Love County, subject however to the approval of the Secretary of the Interior as required by law; that on the same date, to-wit: August 19, 1913, A. N. Thomas, purporting to be the guardian of said Allie Daney, entered into an oil and gas mining lease with the defendants T. H. Dunn and J. Robert Gillam, for a valuable consideration, said lease being executed by said Thomas to said Dunn and Gillam under the orders and directions of the County Court of LeFlore County, and likewise on the form of lease prescribed by the Secretary of the Interior for leasing of lands of full-blood Choctaw Indians for oil and gas purposes, and said lease when executed by said Thomas purporting to be the guardian, to said Dunn and Gillam as lessees, was delivered to said Dunn and Gillam, its validity being dependent upon the approval of the Secretary of the Interior; that said lease executed by the defendant A. N. Thomas to said Dunn and Gillam and shown by Exhibit A to plaintiff's bill, was in due time filed in the office of Dana H. Kelsey, United States Indian Superintendent, with offices at Muskogee, and presented to said Kelsey for transmission to the Secretary of the Interior for his approval or disapproval as provided by the acts of Congress and the rules and regulations prescribed by the Secretary of the Interior; that likewise said J. S. Mullen, lessee under the lease executed by J. J. Eaves, as above detailed, in due time after the execution and delivery of said lease, filed the same, and its quadruplicate parts, in the office of the United States Indian Superintendent at Muskogee, Oklahoma, for transmission to the Secretary of the Interior for his approval or disapproval as provided by the acts of Congress and the rules and regulations prescribed thereunder by the Secretary of the Interior; that said J. S. Mullen entered into an agreement with defendant, Errett Dunlap and defendant Jake L. Hamon, and defendant Frank M. Adams, whereby he agreed that upon the approval of the lease executed to him by J. J. Eaves, curator, he would assign them, subject to the approval of the Secretary of the Interior, an interest in said lease, it being understood between the

parties that they would hold the same thereafter as partners and jointly operate the property for oil and gas purposes thereunder; that immediately upon the filing and presentation of the lease executed by A. N. Thomas to Dunn and Gillam, and the filing of the lease executed by Eaves to Mullen, in the office of the United States Indian Superintendent at Muskogee, a conflict of interests arose between said J. S. Mullen on the one hand, and said Dunn and Gillam, as lessees under their lease upon the other hand; that said J. S. Mullen filed with the United States Indian Superintendent at Muskogee a protest against the approval by the Secretary of the Interior of the lease executed by A. N. Thomas to Dunn and Gillam, and in such protest contended that said Thomas was not the legal guardian of Allie Daney, but that J. J. Eaves was the legal curator, and he alone acting under the orders and directions of the County Court of Love County, Oklahoma, had power and authority to execute a lease on the said forty acres for oil and gas purposes; that the defendants J. Robert Gillam and T. H. Dunn likewise filed a protest with the United States Indian Superintendent at Muskogee against the approval by the Secretary of the Interior of the lease executed by J. J. Eaves to said J. S. Mullen, and in said protest contended that A. N. Thomas was the legal guardian of the person and property of said Allie Daney and alone had authority acting under the orders and directions of the County Court of LeFlore County, Oklahoma, to execute a lease for oil and gas purposes on the forty acres of land in question, and sought to show that J. J. Eaves was not the curator of said Allie Daney and had no authority to act in such matter; that said J. S. Mullen and his associates employed counsel to represent said Mullen before the United States Indian Superintendent at Muskogee and to prosecute Mullen's claim through the Interior Department; that the defendants J. Robert Gillam and T. H. Dunn likewise employed counsel, to-wit: L. S. Dolman of Ardmore, Oklahoma, to represent them before said United States Indian Superintendent and to prosecute their claim through the Interior Department; that briefs were filed with the said United States Indian Superintendent by the respective counsel, and evidence taken, and hearings had, when it became obvious to Honorable Dana H. Kelsey, United States Indian Superintendent at that time, that the Interior Department had no jurisdiction to finally and bindingly decide which of the two, that is, A. N. Thomas purporting to be guardian, or J. J. Eaves purporting to be curator, had authority to act for and on behalf of said Allie Daney, a minor, and said Kelsey was correctly and rightfully of the opinion that the Interior Department had no such jurisdiction, and that any decision the Department might make

in approving one and disapproving the other lease would necessarily relegate the parties to litigation and subject the holder of the approved lease, whichever it may be, to obvious litigation, and said Kelsey decided that under such circumstances it was unwise for the Department to approve either lease, and furthermore decided that such a situation and conflict in alleged authority to represent the minor and execute such lease would result in irreparable injury to the minor, Allie Daney, and delay to her great damage the exploration and development of said forty acres of land for oil and gas purposes; said Kelsey thereupon advised said Dunn and Gillam and their counsel, and advised said J. S. Mullen and his counsel, to enter into an agreement and compromise their controversy by having both J. J. Eaves and said A. N. Thomas join in the same lease for the purpose of eliminating any question as to the right and authority of either to represent the minor, Allie Daney, as a guardian or curator, and further advise the parties that upon the curator and guardian joining in the same lease, the proper way to hold and operate the said lease would be to assign it to a corporation to be organized for that purpose, the stock in said corporation to be equally divided between said Dunn and Gillam upon the one hand, and said Mullen upon the other hand, and advised the parties that upon a compromise arrangement along these lines he would recommend to the Secretary of the Interior the approval of such lease conditioned however upon the bonus being raised to a maximum of \$2,000.00 payable out of the oil in addition to the one-eighth royalty. Under these circumstances the parties, to-wit: Dunn and Gillam upon the one hand, and Mullen upon the other, agreed to procure the execution of the lease to Dunn and Gillam, also by J. J. Eaves, curator, and that upon the lease being thus executed by both parties they would organize the defendant Bull Head Oil Company and assign the lease to it, said Kelsey agreeing to recommend to the Secretary of the Interior that he approve such assignment; and they agreed to issue 18,000 shares of stock as follows: 8,000 shares to Dunn and Gillam, and 8,000 shares to J. S. Mullen, and 1,000 shares to defendant L. S. Dolman, in compensation for his legal services in the controversy before the Interior Department, etc., and 1,000 shares to J. W. Gladney, in consideration of the assignment by him to the Bull Head Oil Company of an oil and gas mining lease on five acres of land, which five-acre lease was really brought into the transaction by defendant, Jake L. Hamon, the equitable owner thereof; that in the issuing of the stock the certificate for the 8,000 shares to go to Dunn and Gillam was issued to T. H. Dunn, trustee, but these defendants aver and plead that neither J. S. Mullen nor Errett Dunlap, nor Jake L. Hamon, nor Frank

M. Adams, nor J. W. Gladney, nor Don Russell knew, or had any notice or knowledge of any kind or character, either actual or constructive, that T. H. Dunn and J. Robert Gillam, or either of them, had any agreement with A. N. Thomas, or D. Thomas, or J. J. Thomas, or A. N. Funkhouser, or Earl McGowan, that Dunn would hold a part of said stock in trust for them, or either of them, nor did either of said parties, to-wit: J. S. Mullen, Jake L. Hamon, J. W. Gladney, Errett Dunlap, Frank M. Adams or L. S. Dolman or Don Russell have any knowledge, notice or information of any kind or character, actual or constructive, of any of the matters and things set up in the plaintiff's bill evidencing or tending to evidence any of the alleged fraudulent acts and deeds of Dunn and Gillam set forth in plaintiff's said bill, and neither of the aforesaid parties had any notice, knowledge or information of any kind or character that either J. J. Thomas, A. N. Thomas, or D. Thomas, or A. N. Funkhouser, or Earl McGowan, had any agreement of any kind or character with said J. Robert Gillam and T. H. Dunn whereby said Dunn and Gillam, or either of them, were to hold in trust any interest in said lease for D. Thomas, or either of said parties; and these defendants aver and plead that the 18,000 shares of stock issued to above detailed was of the value of One Dollar per share, and the 8,000 shares issued to said J. S. Mullen was for the use of himself and his associates who paid therefor into the treasury of the said Bull Head Oil Company the sum of \$8,000 in cash, and said Dunn & Gillam paid into the treasury of the Bull Head Oil Co. on account of their stock the sum of \$8,000 with all of which funds the Bull Head Oil Co. was enabled to begin the exploration and development of said land for oil and gas.

These defendants further aver and plead that it was the agreement between the parties made in the settlement of said controversy before the Interior Department that they would thus pay into the treasury of the company dollar for dollar for all the stock to be issued, and said J. S. Mullen and his associates, to-wit: Frank M. Adams, Jake L. Hamon, Errett Dunlap, L. V. Mullen, J. W. Gladney, J. M. Robberson, Don Lacy, were under said agreement planned for the organization of said Bull Head Oil Company the owners of said eight thousand shares issued to J. S. Mullen, in the following proportions: Jake L. Hamon 1,500; F. M. Adams, 1072½; Errett Dunlap 1072½; J. S. Mullen 1071; L. V. Mullen 1071; J. W. Gladney 71; J. M. Robberson 1071; and each of said parties furnished a part of the \$8,000 paid into the treasury of the company for the 8,000 shares of stock originally to be issued to J. S. Mullen and these defendants aver and plead that at the time the Bull Head Company was planned and organized

their co-defendants, J. Robert Gillam and T. H. Dunn, were seized or pretended to be seized of the oil and gas mining leasehold estate in and to said forty acres of land represented by the lease shown by Exhibit A to plaintiff's bill and were in possession thereof, and the defendants, Jake L. Hamon and Errett Lunlap, in conjunction with said J. S. Mullen and other associates organized said Bull Head Oil Company and paid into the treasury thereof the sum of \$8,000.00, and had assigned to said Bull Head Oil Company the said five-acre Gladney lease for 1,000 shares of said stock, and these defendants aver that at and before the organization of said Bull Head Oil Company and the assignment of the Gladney lease thereto, and the payment of \$8,000.00 into the treasury thereof, they had no notice whatever of the title and claim the plaintiff sets up against the validity of said lease shown by Exhibit A to plaintiff's bill and had no reason to believe or suspect that the plaintiff or Allie Daney had any such title or claim, or any claim or title whatsoever, but that they and each of them believed that said J. Robert Gillam and T. H. Dunn had the legal title to said oil and gas lease and were holding a one-half interest therein in trust for J. S. Mullen and his associates under the agreement effected and brought about by Dana H. Kelsey, United States Indian Superintendent, for the consolidation of the conflicting claims of the parties and the organization of the Bull Head Oil Company for that purpose, and they believed that the title to said oil and gas lease was good and free from any contention of fraud, and that its validity was unquestioned, and they aver and plead that in making said compromise and organizing the Bull Head Oil Company in consummation thereof, and in paying the consideration therefor, that they and each of them acted in good faith without any notice whatever of plaintiff's alleged rights and without any intention in any way to injure or defraud the plaintiff or injure or defraud Allie Daney.

Defendants further state that said lease has been operated for oil and gas skillfully and diligently, and while the land has produced a great deal of valuable oil it necessitated the expenditure of large sums of money, for which defendants and their associates pledged their credit, and said Bull Head Oil Company proceeded to explore and develop said land and operate the same without any question being raised as to the validity of said lease until the summer of 1918, and these defendants aver and plead that the stock has been transferred to innocent parties for a valuable consideration without notice of any of the claims and things set up in plaintiff's bill, and they further state that neither the Bull Head Oil Company nor either of these defendants can be placed in *statu quo*, and that they are innocent purchasers, and they therefore pray that plaintiff's cause be dismissed.

Fourth Paragraph.

For further defense in their behalf these defendants refer to and make all the statements, averments and allegations in Paragraph Three of this answer a part of this the Fourth Paragraph as fully as if herein set out word for word, and in addition aver and plead that the Bull Head Oil Company has no property and never had any property or assets except the forty-acre lease involved in this case, and the Gladney five-acre lease, and the products of said lease, and the machinery and appliances and equipment placed thereon by said Bull Head Oil Company, and said Bull Head Oil Company never at any time since its organization owned any other oil or gas leases until 1917, but was organized for the purpose of owning and operating this lease involved in this case; and defendants further aver and plead that the defendant, Jake L. Hamon, purchased from said J. Robert Gillam and his wife 3266 2/3 shares of said stock, for which he paid in cash the sum of \$25,000.00 and executed his negotiable promissory notes for the balance thereof in the sum of \$50,000.00 to J. Robert Gillam, who represented to said Hamon that he was the owner thereof, and these defendants aver and plead that on the 18th day of April, 1918, the said J. Robert Gillam was seized or pretended to be seized of the legal and equitable title in and to said stock in the defendant, Bull Head Oil Company, and were in actual possession thereof, and said defendant Hamon on said date purchased the same from said J. Robert Gillam for the consideration of \$75,000.00, the sum of \$25,000.00 being paid therefor in cash, and the balance covered by promissory notes due as follows: two promissory notes each for \$12,500.00 due and payable July 15, 1918, and two promissory notes each for \$12,500.00 due and payable October 15, 1918; that said stock was thereupon duly transferred to said defendant Jake L. Hamon on the books of the corporation, and these defendants aver that at and before the taking of said stock and the purchase thereof by said Jake L. Hamon and the payment of said money and the execution of said notes and the payment of \$75,000.00 on said notes, he had no notice whatever of the title and claim the plaintiff sets up in its bill in this suit, and had no reason to believe or suspect that the plaintiff or Allie Daney had any such title or claim or any claim of any kind or character against the validity of said lease, but he verily believed that said J. Robert Gillam then had the legal and equitable right to sell and convey said stock, and fully believed that the Bull Head Oil Company had the legal and equitable title in and to said lease, and these defendants aver that in all said Jake L. Hamon did in making said purchase and in paying said consideration money, he acted in good faith without any notice whatever of the plaintiff's al-

leged rights, and without any intention in any way to injure or defraud the said Allie Daney, and, therefore, these defendants insist and plead that said Jake L. Hamon is a bona fide purchaser of said stock for a good and valuable consideration and without notice of the title and claim set up by the complainant to said lease, or any interest therein, and they therefore pray that this suit be dismissed.

They further aver and plead that said Jake L. Hamon purchased other stock in said corporation and paid a valuable consideration therefor without any notice or knowledge of any kind or character of the claims plaintiff and Allie Daney now set up for the cancellation of said lease, and these defendants aver and plead that the cancellation of said lease is not justifiable under the circumstances of this case, nor is the plaintiff or Allie Daney entitled in equity and good conscience to either a cancellation of said lease or a decree awarding to her any of the stock in said Bull Head Oil Company issued to said J. Robert Gillam or in trust for said Gillam, or issued to his wife, Mrs. J. Robert Gillam, subsequently sold by them to said Jake L. Hamon as above detailed; and these defendants aver and plead that if Allie Daney is entitled to any remedy under the facts stated in the bill, the same is an action for damages against said T. H. Dunn, J. Robert Gillam, D. Thomas, A. N. Funkhouser, Earl McGowan and A. N. Thomas, with probably a decree against said Dunn and Gillam directing them to assign over to said Allie Daney any stock they, or either of them, may still own and hold in the said Bull Head Oil Company, with damages against all the aforesaid parties in such sum as the court may find she is entitled. And these defendants aver and plead that it would be manifestly inequitable and unjust to either cancel said oil and gas lease in whole or in part, or in lieu thereof impound any of the stock in said corporation found by the court to have been transferred for a valuable consideration to bona fide purchasers. That Jake L. Hamon, in purchasing the stock of J. Robert Gillam, referred to in said Fourth Paragraph, paid said J. Robert Gillam the sum of \$25,000.00 cash without any notice, knowledge or information of any kind or character of the plaintiff's alleged cause of action or of Allie Daney's right or claim set up in plaintiff's bill and without any such notice or any intention to defraud or injure or harm said plaintiff or Allie Daney, and said Jake Hamon purchased said J. Robert Gillam stock in the Bull Head Oil Company and paid said \$25,000.00 cash and executed to said Gillam his four negotiable promissory notes for the sum of \$12,500.00 each, two of which notes were due and payable July 15, 1918, and two of which notes were due and payable October 15, 1918, and these defendants aver and plead that all of said notes executed by

said Jake Hamon to said J. Robert Gillam were negotiable and were conveyed and assigned and endorsed by said J. Robert Gillam before maturity for a good and valuable consideration to bona fide purchasers of said notes, or assigned and endorsed by said J. Robert Gillam before maturity for a good and valuable consideration to bona fide purchasers thereof, against whom said Jake L. Hamon had no available defense because said notes were in the hands of bona fide purchasers for good and valuable considerations without notice of any of the equities or defenses said Hamon had against the collection of said notes, and defendants state that said Hamon has paid said notes to the holders thereof because he had no way of defeating their collection on account of them being held by bona fide purchasers who obtained title to the same before maturity and without notice of any defense said Hamon may have had against the collection of said notes and without any notice of the plaintiff's claim set up in this cause upon which it seeks a cancellation of said lease.

Paragraph Five.

For further defense in their behalf these defendants adopt and reiterate all the statements, denials and allegations contained in Paragraphs Three and Four of their answer and in addition thereto aver and plead that on the day of, 1914, defendants J. Robert Gillam and T. H. Dunn were seized, or pretended to be seized of the title to the oil and gas mining lease plaintiff now seeks to have canceled and set aside covering the land therein described, holding an undivided one-half interest therein in their own right, and holding an undivided one-half interest therein in trust for one J. S. Mullen, and the said defendant, Bull Head Oil Company, purchased said lease from the said J. Robert Gillam, T. H. Dunn and J. S. Mullen for the consideration of \$18,000.00, which was then and there truly and actually paid to said J. Robert Gillam, T. H. Dunn and J. S. Mullen by the defendant, Bull Head Oil Company, transferring and issuing to said T. H. Dunn, J. Robert Gillam and J. S. Mullen and certain associates of J. S. Mullen \$18,000.00 of the par value of its capital stock, which capital stock was worth the par value of \$18,000.00 in cash exclusive of the lease assigned to it, and took from said Dunn and Gillam acting in behalf of themselves and for J. S. Mullen an assignment of said lease in pursuance of said purchase, which assignment was duly approved by the Secretary of the Interior under rules and regulations of the Secretary of the Interior. And these defendants aver that at and before the taking of said assignment of said lease and the payment of the consideration therefor, neither said Bull Head Oil Company nor any of these defendants, nor J. S.

Mullen, nor any of his associates, had any notice whatever of the title and claim the plaintiff sets up in its bill and had no reason to believe or suspect that plaintiff had any such right or title or claim whatsoever, but these defendants verily believed that said T. H. Dunn and J. Robert Gillam then had an unimpeachable legal and equitable right and title to said lease, a one-half interest in their own right and an undivided one-half interest in trust for J. S. Mullen, and these defendants aver and plead that in all that was done in making said purchase and in paying said consideration these defendants acted in good faith without any notice whatever of plaintiff's alleged rights and cause of action, and without any intention in any way to injure or defraud the plaintiff or Allie Daney. And so these defendants insist and plead that the Bull Head Oil Company is the bona fide purchaser of said lease for a good and valuable consideration and without notice of the title and claim and alleged cause of action plaintiff sets up in its bill in this case, and they therefore pray that plaintiff's suit be dismissed.

Counterclaim.

These defendants are advised that it is necessary to the ends of justice that there be new parties brought in and made defendants in this case, to-wit: Earl McGowan, who resides at Talihina, Oklahoma; A. N. Thomas, the guardian of Allie Daney, who resides at Talihina, Oklahoma; and J. J. Thomas, the father of A. N. Thomas, who resides at Talihina, Oklahoma; D. Thomas being dead and therefore not available as a party in this cause. And these defendants aver and plead that this court sitting in equity has full jurisdiction and power to render such decree as will do justice to all the parties. And these defendants further aver and plead that under the facts and circumstances alleged in plaintiff's bill A. N. Thomas J. J. Thomas and Earl McGowan are parties to a fraudulent transaction resulting in damage and injury to Allie Daney and resulting in damage and injury to these defendants in the event said oil lease should be cancelled and set aside by a decree of this court, or in the event this court should award plaintiff a decree transferring the stock in said Bull Head Oil Company held by these defendants over to Allie Daney or her guardian, and these defendants aver and plead that they are innocent purchasers of said stock and that they invested many thousands of dollars, as detailed in their answer, in said stock and in said corporation and that they made said investment in good faith and spent their time and energy as well as money in developing said land and in overseeing the affairs of said Bull Head Oil Company; that Errett Dunlap, one of these answering defendants, has acted as president of said company

for a long time without compensation. And these defendants further aver and plead that under the allegations of fact set up in the plaintiff's bill, if true, said lease was obtained by fraud but that these defendants cannot be placed in *statu quo* and they therefore pray that in lieu of a cancellation of said lease, and in lieu of a decree transferring their stock in the Bull Head Oil Company to Allie Daney or to her guardian or to the plaintiff in trust for her, a judgment in favor of plaintiff for damages should be rendered against J. Robert Gillam, T. H. Dunn, J. J. Thomas, A. N. Thomas and Earl McGowan, who are joint wrongdoers; D. Thomas is dead and so is A. N. Funkhouser dead and their estates have been administered and their assets distributed to their creditors and heirs; defendants further aver and plead that said Dunn and Gillam and J. J. Thomas and A. N. Thomas and Earl McGowan are not only amply solvent but possessed of property and assets above all exemptions allowed by law in a sufficient amount to satisfy any judgment the court may render in this case in favor of the plaintiff on behalf of Allie Daney on account of the alleged wrongs and fraudulent acts and deeds of said parties. Therefore, these defendants pray that the court enter an order making said J. J. Thomas, A. N. Thomas and Earl McGowan parties defendant and that they be required to answer the bill of complaint filed by the United States in this cause and to answer this cross petition and these defendants pray that on the final hearing this court award a judgment settling all the equities between the parties and fully protecting these defendants as innocent purchasers of the stock of said Bull Head Oil Company, and these defendants pray for all such other and further general relief as the facts and circumstances may warrant a court of equity in granting and decreeing in a case of this character.

GEO. S. RAMSEY,
FRANK M. ADAMS,
Counsel for said defendants.

State of Oklahoma, County of Carter—ss.

Personally appeared before me O. W. Anderson, a notary Public in and for the above said state and county, Errett Dunlap, who made oath that he is president of the defendant Bull Head Oil Company, a corporation, and that he has read over the foregoing answer and counterclaim and that the denials and allegations of fact therein contained are true as he verily believes, and he makes this affidavit on behalf of the Bull Head Oil Company and on behalf of himself individually and his co-defendants herein answering.

E. DUNLAP.

Subscribed and sworn to before me this 3rd day of October, 1919. (Seal) Frank L. Ketch, Notary Public. My commission expires.....

Filed Oct. 4, 1919, R. P. Harrison, Clerk.

Answer.

Comes now the defendants, T. H. Dunn and N. E. Dunn, and for answer to the Bill of Complaint filed in this cause respectfully allege:

First. They allege that this court is without jurisdiction to hear and determine this cause.

Second. They allege that the allegations in the complaint show that the county court of LeFlore County, Oklahoma, and the Secretary of the Interior have the sole and exclusive authority and jurisdiction over the alleged cause of action, if any is alleged, and this proceeding is a collateral attack upon the judgment of said county court.

Third. They deny each and every allegation of said complaint except those admitted herein.

Fourth. These defendants admit that Allie Daney is a full-blood citizen of the Choctaw Nation, and that the lands described in the complaint were allotted to her; that she was a minor when the oil and gas lease was taken thereon, and that same was not subject to alienation except in the manner provided by law, as alleged in paragraph No. 2 of the complaint.

Fifth. These defendants have no knowledge about the allegations in paragraph No. 3 as to the residence of said Allie Daney, and deny same; nor have they any knowledge about the appointment of J. J. Eaves as curator of her estate except from the records, but allege that the court appointing him had jurisdiction to do so, and that he remained such curator until discharged by the court, and they deny that the admission of Oklahoma into the Union of States, or any law enacted thereafter, discharged him as such curator or guardian.

Sixth. These defendants admit the allegations in paragraph Nos. 4 and 5 of the complaint.

Seventh. These defendants admit that Dunn & Gillam, and later the Bull Head Oil Company, entered into possession of said premises, and developed same, but deny that said oil and gas lease was illegal, fraudulent and void, as charged in paragraph No. 6 of the complaint.

Eighth. These defendants deny that they employed one A. N. Funkhouser to obtain an oil and gas lease on the prem-

ises described, or that he was the agent or attorney or partner of them in said transaction, and they deny that they employed or authorized said Funkhouser to induce Earl McGowan to withdraw his efforts to secure a lease on said lands for any consideration, or that they had any knowledge of such fact if it existed.

Ninth. These defendants deny that there was any oral or verbal agreement between them, and any one else, in substance or effect, that A. N. Thomas, the guardian, should own for his personal use, an undivided one-fourth interest, or any other amount in said lease, to be held in the name of his said father, J. J. Thomas; and they deny that it was then and there agreed that a corporation would be formed under the laws of Oklahoma or any other state, with a capital stock of \$18,000.00, to be known as the Bull Head Oil Company, and to which said lease would be assigned, and that one-fourth of such stock should be issued to J. J. Thomas for the use and benefit of A. N. Thomas, and that any stock should be issued to other parties; and they deny that any agreement was made by them or their agent or any person authorized by them, which was illegal or fraudulent, and for the purpose of cheating and defrauding Allie Daney of her rights in the premises; or that they concealed any fact pertinent thereto, from the county court of LeFlore County, Oklahoma, or the judge thereof, when said lease was approved; and they deny, as alleged in paragraph No. 8 of the complaint, that there was any concealment of any fraud practiced on the county judge of LeFlore County, or upon Dana H. Kelsey, or the Secretary of the Interior, because there was no such fraud as charged; nor any Funkhouser agreement as charged therein, and they further deny that they concealed any fraud in procuring the approval of the assignment of said lease to the Bull Head Oil Company.

Tenth. These defendants deny that they paid no consideration for their stock held in the Bull Head Oil Company, but allege that said stock was issued to them for the interest of T. H. Dunn in said lease when it was assigned to the Bull Head Oil Company, as will hereinafter more fully appear.

Eleventh. These defendants say that during the years 1913 and 1914, they lived at Ardmore, Oklahoma, where T. H. Dunn and J. Robert Gillam were engaged as partners in buying and selling lands on their own account; that in August, 1913, the first well in the Healdton field was brought in, and made about 35 barrels of oil per day, and was not generally regarded as of much importance; that oil leases on lands near said well could, at that time, be procured for a nominal bonus; that within a few days after the well came in, one A.

N. Funkhouser who lived in Talihina, Oklahoma, came to Ardmore and called upon said Dunn and Gillam, and informed them that he could procure a lease on the land described in plaintiff's complaint, but that he had no money with which to pay the \$1.75 per acre bonus which the guardian required, but that if said defendants, Dunn & Gillam would furnish the money required to secure same, and carry him for a half interest in the lease, he would procure the same, and have it taken in their names; that it was understood that the said Dunn & Gillam would provide the necessary money to develop same, and if oil or gas in paying quantities was found thereon, the money paid by them for said lease and its development was to be refunded to them out of the proceeds of the oil or gas from said lease; that a few days later the defendant, Dunn, was in Talihina and met A. N. Thomas, who claimed to be the guardian of said Allie Daney, and the terms of an oil lease were agreed upon between them to-wit:

Dunn & Gillam were to pay \$1.75 per acre bonus, and one-eighth royalty, the lease to be executed upon the blank forms furnished by the Interior Department, for leases on the lands of full-blood Indians, and the lease to be subject to the approval of the county judge of LeFlore County, Oklahoma, where the minor and guardian lived; and a sale of said lease was regularly had before the county judge of LeFlore County, Oklahoma, and the said T. H. Dunn and J. Robert Gillam were the highest bidders therefor, and said lease was sold to them, and the same was approved by the said county judge, and no fraud of any character known to said defendants was perpetrated to secure such approval; that having secured said lease, same was by them duly presented with an application for approval to Dana H. Kelsey, Superintendent of the Five Civilized Tribes, for the approval of the Secretary of the Interior, as prescribed by the rules and regulations of said Secretary of the Interior.

Twelve. These defendants further allege that on the same day that they purchased said lease as aforesaid, but unknown to them at the time, one J. J. Eaves, curator of the estate of said Allie Daney, executed an oil and gas lease covering the same lands to J. S. Mullen; that said lease was executed according to law, and upon the blank forms provided by the Secretary of the Interior, and was duly presented by the said J. S. Mullen to said Dana H. Kelsey for the approval of the Secretary of the Interior; that these defendants and said J. S. Mullen were notified by said Dana H. Kelsey about the conflicting leases executed by said guardian and said curator on said land, and notified that a hearing would be had to determine which lease should be approved; that said hearing

was had, and said Dana H. Kelsey decided that he would reject both leases, and let the courts determine which, as between the guardian and curator, had authority to make a lease on said land, unless the parties agreed among themselves as to which should have said lease; and that he would not recommend either lease for approval unless both the guardian and curator executed same. He further advised them, after making investigation of the value of said lease, that he would not recommend either lease for approval unless an additional bonus of \$2,000.00 was paid by the lessees for said land; that acting upon the suggestion and advice aforesaid, the said T. H. Dunn and J. Robert Gillam and J. S. Mullen finally reached an agreement which met with the approval of said Dana H. Kelsey, which agreement was that a corporation would be organized under the laws of the State of Oklahoma, and be known as the Bull Head Oil Company, with a capital stock of \$18,000.00; and that either lease would be recommended for approval if it was executed by both the guardian and curator, and the \$2,000.00 additional bonus paid, and the lessees in said lease should transfer their interest in same to said corporation above named; and said Dana H. Kelsey would recommend the approval of the assignment of said lease to said corporation; that all of this was done, and a lease held by J. S. Mullen on five acres of land, known as the Gladney land was also assigned to said corporation, said land being the West half of the Southwest Quarter of the Northeast Quarter of the Southwest Quarter of Section Four (4), Township Four (4) South, Range Three (3) West.

Thirteenth. These defendants further allege that the said J. J. Eaves was, and had been for a long time, the curator of the estate of said Allie Daney, legally appointed and qualified, and was such when the said Thomas was appointed guardian, and that he remained such curator or guardian after Oklahoma was admitted to statehood, and until he resigned, which was after the execution of said lease.

Fourteenth. These defendants further allege that after the said Dana H. Kelsey was fully advised of the facts above alleged, and the payment of the additional \$2,000.00 had been made, which defendants allege was an amount fixed by said Dana H. Kelsey, after an investigation, as a reasonable bonus for said lease, that the said Dana H. Kelsey, acting in his official capacity, did, on the 27th day of January, 1914, recommend to the Secretary of the Interior for approval, the lease executed to T. H. Dunn and J. Robert Gillam, and signed by the said A. N. Thomas, guardian, and J. J. Eaves, curator, and the assignment thereof to the Bull Head Oil Company.

Fifteenth. These defendants allege that when Dunn and Gillam secured the lease, but before approval thereof, it was understood and agreed with Funkhouser that his interest was contingent upon the discovery of oil on said premises; that after the organization of said corporation, said Dunn caused the stock to be issued in various amounts to him as trustee, by direction of said Funkhouser, so that he could hold same until oil was discovered, and the money paid which he and Gillam had advanced to secure said lease, and the expenses incurred in securing same; that the balance of the stock issued to him and N. E. Dunn, was for his interest in said lease, which the corporation agreed to pay him in stock for the transfer of said lease; and these defendants deny that the guardian, A. N. Thomas, owned or claimed any interest in this lease, or stock in the Bull Head corporation, and say that if he really owned the stock held in the name of his father, it was unknown to them. That the stock was issued as follows: one-half of \$8,000.00 thereof as directed by said Funkhouser, and held in trust by T. H. Dunn, as heretofore alleged. These defendants say that they have acted in entire good faith, both to the minor and Funkhouser, but are not responsible for his acts, as he was not their agent, attorney or partner in said transaction.

Wherefore, these defendants pray that they be discharged with their costs, and have such other and further relief as they may be entitled to in the premises.

JOHNSON & MCGILL,
Attorneys for Defendants.

State of Oklahoma, County of Carter, ss.

T. H. Dunn, being duly sworn, upon oath states that he has read the foregoing answer, and the matters and things therein set forth are true.

T. H. DUNN.

Subscribed and sworn to before me this 30th day of September, 1919. Claudia McIntyre, Notary Public. My commission expires August 19, 1922. (Seal)

Filed Oct. 4, 1919. R. P. Harrison, Clerk.

Separate Answer of J. Robert Gillam and Mrs. J. Robert Gillam.

Come now the defendants, J. Robert Gillam and Mrs. J. Robert Gillam, and for answer to the Bill of Complaint herein filed, say that the same should be dismissed for the following reasons, to-wit:

- 1st. Because said Bill is a collateral attack upon the judgment of the County Court of Love and LeFlore Counties, Oklahoma.
- 2nd. Because the matters and things complained of are cognizable only before the Secretary of the Interior, and this court has no jurisdiction thereof.
- 3rd. Because said complaint fails to state facts sufficient to constitute a cause of action against these defendants.

For further answer to said Bill of Complaint, these defendants say:

1.

They deny both generally and specifically each and every material allegation therein contained except such as are hereinafter admitted.

2.

They admit that Allie Daney is a full-blood female Choctaw Indian, under the age of 18 years, and that she received as her allotment of the tribal lands, the land described in the first numbered paragraph of said Bill of Complaint.

They admit that J. J. Eaves was appointed curator of the estate of the said Allie Daney, by the United States Court for the Southern District of Indian Territory, sitting in probate. That said appointment was made on or about the 8th day of November, 1905, and that after statehood the said curatorship proceedings were transferred to the County Court of Love County, Oklahoma; but deny that said Allie Daney was not a resident of said Southern District at the time of such appointment.

They admit that on or about the 24th day of July, 1911, the County Court of LeFlore County, Oklahoma, entered its order appointing one A. N. Thomas as guardian of the person and estate of the said Allie Daney; and that immediately thereafter, the said Thomas qualified as such guardian, and has ever since, and now is attempting to exercise the duties of such guardian.

They admit all of the matters and things set forth in the fifth numbered paragraph of the Bill of Complaint.

They admit that the Bull Head Oil Company entered into the possession of said premises and developed the same for oil and gas, and that the said company is now in possession thereof, and continuing to develop the same.

They admit that the lease mentioned and described in the fifth numbered paragraph of the Bill of Complaint, and the assignment thereof to the Bull Head Oil Company, were duly presented to Dana H. Kelsey, United States Indian Agent at Muskogee, Oklahoma, for his examination, and for the purpose of having the same approved by the Secretary of the Interior. That the said Kelsey recommended the approval thereof; that the same was subsequently approved by the said Secretary of the Interior on or about the 3rd day of February, 1914, and that the said lease and assignment thereof are now in full force and effect.

3.

These defendants specifically deny that the appointment of J. J. Eaves as curator aforesaid was invalid, as in plaintiff's Bill of Complaint set forth.

They deny that the coming of statehood terminated the authority of the said curator, or that the same was terminated by Act of 1908 or any other act.

They deny that the defendants, T. H. Dunn and J. Robert Gillam, began the development of the said lease before the assignment thereof to the Bull Head Oil Company.

They deny that A. N. Funkhouser ever acted as agent for these defendants or either of them in the procurement of said lease, or in any negotiations therefor. They deny that at the time of the acquirement of said lease the same was worth more money than that paid therefor, or that a higher price could have been obtained for the same.

They deny that the defendants J. Robert Gillam and T. H. Dunn were partners in the acquisition of said lease, and that they perpetrated any fraud whatsoever in the acquisition of the same.

They deny that A. N. Thomas ever had any interest in said lease or any interest in the stock issued in the name of T. H. Dunn, Trustee, at the time of the formation of the Bull Head Oil Company. They deny that they had any knowledge that the said A. N. Thomas had or was to have any interest in the stock in the Bull Head Oil Company, if any, which was issued to J. J. Thomas, or that they ever knowingly purchased any stock from the said A. N. Thomas, either directly or indirectly.

They deny that they or either of them had any secret agreement with A. N. Thomas or anyone in his behalf, or any knowledge of any agreement by which the said A. N. Thomas was to share either in the aforesaid lease or in the stock of the Bull Head Oil Company.

They deny that they or either of them ever in any manner deceived the Judge of the County Court of LeFlore County, or Dana H. Kelsey, or had any knowledge that either the Judge of the said County Court or the said Kelsey were in any manner deceived or misled to induce them to approve said lease. And they specifically deny that the said Dana H. Kelsey was deceived by the affidavit set out in subdivision "b" of paragraph eight of plaintiff's Bill of Complaint, and charge on the contrary that the said Kelsey knew at the time said affidavit was made, that various persons other than T. H. Dunn and J. Robert Gillam were interested in said lease, and that he recommended the approval thereof with the full knowledge of such interests.

4.

Further answering, these defendants deny that the signing of the said lease by J. J. Eaves as curator of the estate of Allie Daney, and its approval by the Probate Court of Love County, in no way effected the validity of said lease, as in plaintiff's Bill of Complaint alleged, or that the authority of the said curator over the property of the said minor had ever ceased or terminated, but charge that on the contrary, the said Eaves was duly appointed curator of the estate of the said Allie Daney by the United States Court prior to statehood, and that he had not been discharged or removed, and that he was occupying such position of curator at the time of the execution of said lease.

That prior to the execution of the joint lease referred to in the fifth numbered paragraph of the Bill of Complaint, by the said Eaves as curator aforesaid, he, the said Eaves, acting in his said capacity of curator of the estate of Allie Daney, had made, executed and delivered to one J. S. Mullen for a good and valuable consideration, an oil and gas lease, which said lease was duly approved by the Probate Court of Love County, Oklahoma, having jurisdiction over said curatorship, and that at the time of the execution of the lease aforesaid in favor of the said T. H. Dunn and J. Robert Gillam, the said Mullen lease had been filed in the office of the Indian Agency at Muskogee for approval. That the lease prior to said date, executed by Atha Thomas as guardian of Allie Daney and approved by the Probate Court of LeFlore County, Oklahoma, had also been filed in the office of the Indian Agency for approval, but that neither of said leases had yet been approved by said agency; that a dispute arose between the lessees named in the lease executed by said curator to the said Mullen and those named in the said guardian's lease to the said T. H. Dunn and J. Robert Gillam, and that the said Indian Agency refused to approve either of said leases until the said lessees

should settle and compromise their differences, and that it was then and there agreed that in consideration of the moneys paid to him by the said Mullen and the additional consideration of \$50.00 per acre, the appraised value put on said lease by the Indian Agency through its duly appointed appraisers, that said curator should also execute the said lease theretofore executed by the said guardian in favor of T. H. Dunn and J. Robert Gillam, and that the same should be approved by the Probate Court of Love County; that an assignment of said lease so executed both by said guardian and by said curator, when approved by the said Indian Agency and the Secretary of the Interior, should be made to the Bull Head Oil Company, a corporation to be formed by the said J. S. Mullen, T. H. Dunn and J. Robert Gillam; that said corporation was organized under the name of the Bull Head Oil Company, and that said lease was transferred to the said company which said transfer was by the said Indian Agency and the said Secretary of the Interior duly approved, coincident with the approval of the said oil and gas lease executed by the said curator and the said guardian as aforesaid; that coincident with the approval of said lease, as a further consideration for the execution of same, the said Indian Department caused the said lease to be appraised by disinterested appraisers appointed by said agency, and that the same was appraised at the further consideration of Fifty Dollars (\$50.00) per acre bonus, and that the said further consideration for the execution of said lease was duly paid over to the said Allie Daney for her use and benefit; that the said lessees and their assigns have duly complied in all things with the terms and conditions of said lease and operated the same to the great profit and benefit to the said Allie Daney, and that they have paid over to her large sums of money under and by virtue of the terms thereof; that by reason of the matters and things aforesaid, the lease is a good, valid and subsisting lease in full force and effect, and the said Allie Daney and her legal representatives are bound by all of the terms and conditions thereof.

5.

Now these defendants believe and so plead, that the execution of the lease herein sought to be cancelled, by the said J. J. Eaves, curator, of the estate of Allie Daney as set forth in the last preceding paragraph, and the subsequent approval thereof by the Probate Court of Love County, and by the Department of the Interior, made the same a good and valid lease without the execution thereof by A. N. Thomas, the purported guardian; but if defendants are wrong in this, and if, as a matter of law, the authority of the said Eaves as cu-

rator had terminated at the time of the execution thereof by him, then and in that event, and as a further defense herein, they say that the appointment of the said guardian, A. N. Thomas, was legal and valid, and that the execution of said lease by him, the said guardian, and its approval by the Probate Court of LeFlore County and its subsequent ratification and approval by the Indian Agency at Muskogee and by the Secretary of the Interior, was valid and binding and sufficient to pass a good title to said lease. That the said lessees and their assigns have complied with all the terms and conditions thereof; that they have duly developed said premises and in so doing have expended large sums of money thereon, and have produced large quantities of oil therefrom and paid over large sums in royalties to the said lessor, to her great and lasting benefit, and that by reason thereof, said lease is now a good, valid and subsisting lease, and in full force and effect.

6.

Defendants would further show to the court that if any fraud whatsoever was ever perpetrated in connection with the procurement of said lease, as in plaintiff's Bill of Complaint alleged, that they have no knowledge thereof; that they were not parties thereto, and that they acquired their interests, if any, in said lease or in the Bull Head Oil Company, in good faith and for value; that they have since disposed of said interests, and that they do not now own any interest whatsoever either in said lease or in the stock of the Bull Head Oil Company, and should said lease be cancelled, or should the stock of said company be decreed to be held in trust for the use and benefit of Allie Daney, as in plaintiff's Bill of Complaint prayed, that the parties hereto cannot be placed in *statu quo*, and that great and irreparable injury and damage will result.

Wherefore, these premises considered, defendants pray that the relief sought by the plaintiff herein be denied, and that they have judgment for their costs in this behalf expended.

WM. G. DAVISSON,

C. B. STUART,

Attorneys for Defendants.

State of Oklahoma, County of Carter, ss.

J. Robert Gillam, being first duly sworn, says that he is one of the defendants above named; that he has read the foregoing answer and knows the contents thereof; and that the matters and things therein contained are true.

J. ROBT. GILLAM.

Subscribed and sworn to before me this 29th day of September, 1919. Louise Wall, Notary Public. My commission (Seal) expires 3-10-21.

Filed Oct. 6, 1919. R. P. Harrison, Clerk.

Separate Answer of L. S. Dolman.

Comes now defendant herein, L. S. Dolman, and for answer to plaintiff's Bill of Complaint, says that the same should be dismissed for the following reasons, to-wit:

1st. Because said bill is a collateral attack upon the judgment of the County Court of Love and LeFlore Counties, Oklahoma.

2nd. Because the matters and things complained of are cognizable only before the Secretary of the Interior, and this court has no jurisdiction thereof.

3rd. Because said complaint fails to state facts sufficient to constitute a cause of action against this defendant.

For answer to said complaint this defendant denies each and every, all and singular the allegations contained therein, save and except such allegations as are hereinafter specifically admitted.

First.

This defendant admits the allegations contained in paragraphs one and two of plaintiff's Bill of Complaint.

Second.

Defendant answering paragraph three admits that Allie Daney was born near Talihina, LeFlore County, Oklahoma, but denies that she has not resided elsewhere prior to the year 1918.

Defendant admits that J. J. Eaves was duly appointed curator of the estate of Allie Daney in 1905 by the United States Court for the Southern District of Ind. Ter. and admits that after the execution and approval of the oil and gas lease to defendants, Dunn & Gillam, as hereinafter alleged, said cause was upon application of J. J. Eaves transferred to the County Court of LeFlore County, Oklahoma.

Defendant denies that Allen Daney was never a resident of the Southern District of Ind. Ter., as alleged in paragraph three of plaintiff's bill of complaint, or that said appointment and qualification of said J. J. Eaves as curator was not a valid

and subsisting curatorship of the estate of Allie Daney at the time of the execution and approval of said lease.

Third.

Defendant answering paragraph four of said complaint admits that on or about July 24, 1911, A. N. Thomas was by order of the County Court of LeFlore County, Oklahoma, appointed and qualified as guardian of the person and estate of the said Allie Daney, but denies that said appointment gave said guardian jurisdiction of said minor's estate by reason of the prior, outstanding, existing, guardianship of said estate by J. J. Eaves.

Fourth.

This defendant answering paragraph five of said complaint admits the allegations contained therein.

Fifth.

Defendant answering paragraph sixth of said complaint alleges that the assignment of said lease from defendants, Dunn & Gillam, to the Bull Head Oil Company was transmitted to the Honorable Superintendent to the Five Civilized Tribes simultaneously with the lease and that both assignment and lease were duly approved at about the same time, and that the Bull Head Oil Company took possession and developed said property.

Said defendant denies that said lease or assignment were illegal, fraudulent or void for any reason.

Further answering subdivision (a) of paragraph 6th defendant admits that oil was discovered at Healdton in August, 1913, but denies that said discovery resulted in a large demand for oil and gas leases, or that large bonus or cash payments were offered for said leases in addition to the rentals and royalties provided for in said leases, as alleged, or that said oil and gas lease upon the lands of said Allie Daney could have been sold for a higher or better price than it sold for.

That as to the remainder of said subdivision (a) of paragraph 6th this defendant has not sufficient knowledge or information upon which to form a belief and, therefore, denies the same.

Defendant further answering subdivisions (b), (c) and (d) says that he has not sufficient knowledge or information upon which to form a belief, and, therefore, denies the same.

Sixth.

Defendant answering paragraph 7 of said complaint de-

nies that the County Judge of LeFlore County was not fully informed with reference to the execution and delivery of said lease to Dunn & Gillam as the highest and best bidder at said sale of said lease, or that any fraud was practiced upon him to secure an approval of the same.

Seventh.

Answering paragraph eight of said complaint this defendant admits that said lease to T. H. Dunn and J. Robert Gillam was filed with the United States Indian Superintendent sometime in August or September, 1913, for approval as required by the rules and regulations of the Department of the Interior, but that said superintendent failed, neglected and refused to approve the same in the manner and form as said lease then appeared, and said lease in said form was not at that time, nor has it been since that time, either recommenced for approval to the Secretary of the Interior or approved by him.

Further answering subdivisions (a) and (b) of said paragraph eighth, defendant says that sometime prior to November 8, 1905, the parents of Allie Daney removed to the Southern District of Indian Territory and lived with their daughter, Allie Daney, in said Southern District of Indian Territory.

That upon or about November 8, 1905, upon the written request of the father of Allie Daney, J. J. Eaves was duly and regularly qualified as the curator under the laws then in force over the estate of said Allie Daney and at once entered upon his duties as such curator, and was in possession of said land described in plaintiff's bill of complaint for said Allie Daney, renting the same for agricultural purpose upon the date said oil and gas leases were executed as hereinafter set out.

That upon the 19th day of August, 1913, said J. J. Eaves as such curator of said estate made and executed an oil and gas mining lease upon departmental forms as required by the rules and regulations of the Department of the Interior, to one J. S. Mullen, as lessee, which said lease was duly and regularly approved by the County Court of Love County to which said cause had been transferred on the formation of the State of Oklahoma; that said lease was then filed in the office of the United States Indian Superintendent, as required by the rules and regulations, but that said Superintendent failed, neglected and refused to recommend the approval of the same in the manner and form in which the same then appeared, and same was not recommended for approval nor approved by the Secretary of the Interior.

That after Oklahoma was formed as a state and without the knowledge or consent of said J. J. Eaves, curator, or the

County Court of Love County, on application A. N. Thomas was on July 24, 1911, duly appointed guardian of the person and estate of Allie Daney, and upon the 19th day of August, 1913, said A. U. Thomas as such guardian made and executed an oil and gas mining lease upon departmental form upon said land to T. H. Dunn and J. Robert Gillam, which lease was upon said date duly and regularly approved by the County Court of LeFlore County and filed with the United States Indian Superintendent at Muskogee in all things as provided by the rules and regulations of the Secretary of the Interior. That by reason of the filing of such oil and gas mining leases, one to J. S. Mullen, approved by the County Court of Love County, Oklahoma, the other to said T. H. Dunn and J. Robt. Gillam, approved by the County Court of LeFlore County, Oklahoma, both executed upon the same day, a contest arose before said Superintendent as to which of said leases it was his duty to recommend for approval.

That the question of which County Court had jurisdiction of the estate of Allie Daney was a justifiable one, over which said superintendent had no jurisdiction, and said superintendent then and there decided to disapprove both of said leases and so informed said J. S. Mullen and Dunn & Gillam, but withheld his judgment thereon until a new lease could be procured duly executed by both said J. J. Eaves and A. N. Thomas and approved by both of said courts and a proper bonus fixed by the Department of the Interior. That thereupon said contestants proposed to settle their differences by the organization of the Bull Head Oil Company and the proper execution of one or the other of said leases and the assignment of the same to said Bull Head Oil Company, said assignment and said lease so executed to be forwarded to the Secretary of the Interior for his approval.

That said company was organized, said lease executed by both guardians to T. H. Dunn and J. Robert Gillam, approved by the County Court of Love County and LeFlore County, a bonus of \$2000.00 fixed by said Department as a reasonable bonus for the same, and said lease with the assignment to said Bull Head Oil Company forwarded to said secretary with all the data with reference to said contest, settlement and all the documents, evidence, findings and briefs upon the same, and was by the said Secretary duly approved. Defendant denies that there was any concealment, fraud or misrepresentation practiced upon said superintendent or said Secretary of the Interior in the procurement of the execution or approval of said lease, or assignment of the same to the Bull Head Oil Company; that all the negotiations, transactions and other things done by the parties thereto were open

and above board and fully and freely discussed and presented in briefs, documents and other evidence which were at the time and are now, so far as this defendant is informed and believes, deposited among the files of the Department of the Interior in said case—a true and correct copy of said written agreement comprising said case is hereto attached, marked Exhibit "A" and made a part hereof.

Eighth.

Answering paragraph nine of plaintiff's complaint, this defendant denies that a larger bonus was offered or could have been obtained at the time said lease was offered for sale. On the other hand, after the time of the execution of said lease by J. J. Eaves, as curator, and the approval of the same by the County Court of Love County, and after the settlement of said conflicting leases before the United States Superintendent, the oil inspector for the Interior Department fixed the bonus upon said joint oil and gas lease at \$2,000.00, which was paid and liquidated as determined by said inspector.

Nine.

Answering paragraph ten of said plaintiff's bill of complaint, this defendant denies that said Bull Head Oil Company was contemplated or organized under any agreement made prior to the compromise settlement, as evidenced by this defendant's Exhibit "A," or that this defendant had any knowledge or information with reference to any agreement existing prior to said compromise, and denies specifically that he was informed or knew of any such agreement. This defendant denies that he represented, either as attorney or otherwise, T. H. Dunn & J. Robert Gillam in the procurement of the execution or approval of the LeFlore County lease, and specifically denies that he has any information or knowledge of any of said proceedings prior to the contest arising before the Department upon said conflicting leases.

This defendant admits that he assisted in the organization of said Bull Head Oil Company, and under said compromise agreement received \$1,000 worth of stock in said company for his services in the compromise settlement and organization of said company, as outlined in said Exhibit "A."

That this defendant has been a director in said company since its organization and denies that any such agreement as alleged by plaintiff was ever discussed or brought to the notice of said defendant personally, or as a director in said company.

Defendant denies that the officers and directors of said

Bull Head Oil Company at any time concealed any information or knowledge of any of the affairs of said company from either the superintendent or the Secretary of the Interior, but on the other hand disclosed to both said officials all of the facts and circumstances surrounding the execution and approval of said lease contract, and this defendant denies that either of said officials were induced to approve the same by fraud or concealment.

Ten.

Answering paragraph eleven of plaintiff's Bill of Complaint this defendant admits the allegations in said paragraph except that portion of the same which charges that the signature of said J. J. Eaves to said lease, and the approval of the same by the county court of Love County was illegal and void, which portion this defendant denies.

Eleven.

Answering paragraph twelve of said complaint this defendant denies that said Bull Head Oil Company was contemplated or organized except under the circumstances and conditions as heretofore alleged and denies that the compromise or settlement, or the organization of said company, was in any manner under the dictation of Dunn & Gillam, except as above stated.

Defendant admits that in the settlement and compromise of said controversy a departmental lease upon five acres adjoining said Allie Daney land was assigned to said Bull Head Oil Company by J. W. Gladney, for which he received stock, and that this defendant was to receive \$1000 worth of stock as set out in said agreement. Defendant denies that he was not entitled to the same and specifically denies that there was any fraud in the character of said transaction, or that the same was illegal or void.

With reference to the further allegations contained in said paragraph twelve, this defendant has not sufficient knowledge or information upon which to form a belief, except that this defendant denies that the Bull Head Oil Company has no other property and leases than the Allie Daney and J. W. Gladney lease, but that on the other hand said company owns and operates other leases elsewhere, from which oil and gas is being produced and denies that all the income received by said company is derived from said Daney and Gladney leases.

Twelve.

Further answering, this defendant says that the Bull Head Oil Company is a going concern and has since the settle-

ment and compromise of conflicting leases, as above set out, in January, 1914, been in exclusive possession of said Daney lease, developing and operating the same under the immediate supervision and direction of the Secretary of the Interior, and all rentals and royalties upon the same have been collected and received by him, and during all of said time all documents, briefs, papers and evidence taken at the hearings and upon the compromise of said case has been in his possession and under his control, and he has had constant reports and correspondence with reference to all the details concerning the same, and that said plaintiff by such action on the part of said plaintiff during all these years is now estopped in equity from prosecuting this action.

Wherefore, this defendant having fully answered the complaint of plaintiffs prays judgment against the plaintiff for a dismissal of said action and for costs.

L. S. DOLMAN,
Attorney.

State of Oklahoma, Carter County, ss.

L. S. Dolman, being duly sworn, upon oath says that he has read the foregoing answer, and that the matters and things therein set forth are true as he verily believes.

L. S. DOLMAN.

Subscribed and sworn to before me this 30th day of Sept. 1919. Margaret Lawson, Notary Public. (Seal) My com. expires July 5, 1923.

Exhibit "A."

Agreement between J. S. Mullen, party of the first part, and T. H. Dunn and J. Robert Gillam, parties of the second part.

Witnesseth: That whereas there is now pending before the Department of the Interior for approval, oil and gas leases as follows:

The oil and gas lease executed by J. J. Eaves, Curator of Allie Daney, a minor, approved by the County Court of Love County, Oklahoma; the oil and gas lease executed by A. N. Thomas, guardian of Allie Daney, a minor, approved by the County Court of LeFlore County, Oklahoma, both of which said leases cover the W/2 of SW/4 of SW/4; and S/2 of NW/4 of SW/4 of Section 4, township 4 south, range 3 west, and

Whereas, said parties have agreed upon a settlement of the differences concerning the same;

Now Therefore, as a memorandum of said settlement, it is hereby agreed that said party of the first part will take such action as will result in the Dunn and Gillam lease being executed properly by J. J. Eaves, as curator of Allie Daney, and the curatorship proceedings transferred to LeFlore County, Oklahoma, and that said J. J. Eaves will resign from said curatorship.

That a corporation will be organized under the name of the Bull Head Oil Company, or such other name as will be acceptable with a capital stock of Eighteen Thousand (\$18,000.00) Dollars; that said parties of the second part shall assign to said corporation, said lease, upon its approval by the Secretary of the Interior.

That said party of the first part will cause to be assigned to said corporation what is known as the "Gladney" oil lease, consisting of five (5) acres of restricted lands, being the W2 of SW4 of NE4 of SW4 of Section 4, township 4 south, range 3 west; all of which assignments shall be filed with the Department of the Interior, and such action taken as will perfect the title to the same in said corporation to be organized.

That upon the incorporation and organization of said company, and in consideration of the said assignments, stock shall be issued to party of the first part, or such persons as he may designate, in the amount of \$8000.00, and to the parties of the second part, or such persons as they may designate, stock in the amount of \$8000.00 and there shall be issued to L. S. Dolman \$1000.00 of said stock, which shall be in full payment to him of legal services performed heretofore, and for the incorporation and organization of said company, and perfecting of the title to said leases in said company, and no further. That \$1000.00 of non-voting stock shall be issued in the name of J. W. Gladney and said J. W. Gladney, his heirs, administrators and assigns, shall participate in all the revenues and profits of said company, but that said stock shall be marked non-voting, and remain in the care and keeping of the Secretary of said corporation.

It is further agreed that all expenses necessary to the perfecting and approval of said lease, and the incorporation and organization of said company, shall be borne equally by the parties hereto.

In Witness Whereof, we have hereunto set our hands in duplicate, on this 9th day of January, 1914.

J. S. Mullen,
Party of the first part.

T. H. Dunn,
J. Robt. Gillam,
Parties of the second part.

State of Oklahoma, Carter Couunty, ss.

Before me, the undersigned, a notary public in and for said county and state on this 9th day of January, 1914, personally appeared J. S. Mullen, and T. H. Dunn and J. Robert Gillam, to me well known to be the identical persons who executed the within and foregoing instrument in a plieate and acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned and set forth. F. M. Adams, Notary Public. (Seal) My com. expires Jan. 11, 1915.

Filed Oct. 6, 1919. R. P. Harrison, Clerk.

Separate Answer of Defendant, E. L. McCain.

Comes now defendant, E. L. McCain, and for separate answer to the Bill of Complaint filed against him in this case says: that he adopts the joint and separate answers of the defendants, Bull Head Oil Company, a corporation, Don Russell, Errett Dunlap, Jake L. Hamon and F. M. Adams, and makes all the denials and averments therein contained a part of this answer, and he adopts the cross petition with all its allegations and joins in the prayer for relief therein contained, and in addition thereto avers and pleads that on or about the day of March, 1914, A. M. Funkhouser was seized or pretended to be seized of stock in the Bull Head Oil Company to the extent of 333 1/3 shares thereof, and this defendant purchased from said Funkhouser at that time said stock for a consideration of \$200. and the cancellation of an indebtedness owing this defendant by said Funkhouser to the extent of and this defendant at the time he purchased said 333 1/3 shares of stock from said Funkhouser and paid the consideration of \$200. cash therefor and cancelled the indebtedness acted in good faith and had no knowledge, notice or information of any kind or character of any of the alleged fraudulent acts and deeds set forth in plaintiff's bill, and had no notice, knowledge or information that it was claimed that Funkhouser had obtained his interest in said Bull Head Oil Company through any fraudulent means, and this defendant avers and pleads that all he did in said matter was free from fraud and without any intention to do the plaintiff or Allie Daney any harm or injury, and he therefore pleads that he is an innocent purchaser of said stock and entitled to hold the same.

GEO. S. RAMSEY,
Attorney for Defendant.

State of Oklahoma, Osage County, ss.

Personally appeared before me F. M. Morris a Notary

Public in and for the above state and county the defendant, E. L. McCain, who made oath that he has read over the above answer and that the facts and statements therein contained are true.

E. L. McCAIN.

Subscribed and sworn to before me this 6th day of October, 1919. F. M. Morris Notary Public. (Seal) My Com. Exp. Apr. 21, 1923.

Filed Oct. 9, 1919. R. P. Harrison Clerk.

Order.

This cause came on for further hearing, Honorable Robert L. Williams, Regular Judge, presiding, on this April 26th, 1920, at a term of this court held at Ardmore, Oklahoma. Whereupon, counsel for the defendants, Bull Head Oil Company, a corporation, J. S. Mullen, Errett Dunlap, Jake L. Hamon, Don Russell and F. M. Adams, move the court for leave to amend the joint and separate answers of said defendants heretofore filed so as to add thereto Paragraph Six, the following to-wit:

"For further defense in their behalf, these defendants adopt, reiterate and incorporate herein all the statements, allegations, denials and averments in paragraphs three, four and five of their answer, and further allege that it was the intention of J. J. Eaves, curator of the estate of Allie Daney, a minor, J. S. Mullen, J. Robert Gillam, T. H. Dunn and Honorable Dana H. Kelsey, United States Superintendent of Indian Affairs, at Muskogee, Oklahoma, that said J. J. Eaves should join in the oil lease involved in this case executed by Atha N. Thomas, purporting to be guardian of Allie Daney, on August 19, 1913, and set up on plaintiff's bill that it was the intention of said J. J. Eaves and said parties mentioned aforesaid that said J. J. Eaves should become a lessor in said lease as guardian of the estate of said Allie Daney, or her curator; that said J. J. Eaves did execute said lease on January 26, 1914, that said J. J. Eaves and the aforementioned parties understood and intended that said Eaves, as curator of Allie Daney, or guardian of her estate, should by executing said lease as such curator, make the same a lease on the lands herein described belonging to her, for oil and gas purposes, on Departmental form, subject to the approval of the Secretary of the Interior; that the County Court of Love County in ordering said Eaves to execute said lease to T. H. Dunn and J. Robert Gillam, and in confirming the execution of said lease by said Eaves as curator, intended and understood that said Eaves became a lessor in said lease as cu-

rator of Allie Daney, and that the said lease should operate as a lease for oil and gas purposes on the Departmental form on the land therein described belonging to Allie Daney; that the failure to incorporate in the body of said lease and granting clause thereof the name 'J. J. Eaves, curator of Allie Daney, a minor,' as lessor, was the result of mistake of law upon the part of Eaves and the said County Court of Love County, in thinking that said Eaves by signing and acknowledging said lease as curator became lessor therein; that said mistake was a mistake with respect to the effect of his signing the lease and acknowledging the same without his name appearing in the body of the lease as lessor or grantor. And these defendants, therefore, by way of cross relief, pray that this court reform said lease by its decree, so as to incorporate in the body thereof the name 'J. J. Eaves, curator of Allie Daney, a minor,' as lessor, and that said lease be treated, decreed and adjudged as the lease of J. J. Eaves, curator of the estate of Allie Daney, a minor, for oil and gas mining purposes, according to all of its terms and provisions."

And said proposed amendment having been submitted to the court in the presence of counsel for the plaintiff and the defendants, and duly considered.

It is ordered, adjudged, decreed and considered that said amendment be allowed, and the filing of this order, and its entry on the records of this court shall operate as an amendment to said answer of the defendants as of record. To which action of the court the plaintiff in open court duly excepted and still excepts.

Made and ordered entered this April 26th, 1920.

R. L. WILLIAMS, Judge.

Filed Apr. 26, 1920, W. V. McClure, Clerk.

(Memorandum Findings.)

I find the following facts established from a fair preponderance of the evidence in this case:

That this action was brought by the United States of America under the direction of the Attorney General of the United States and at the request of the Secretary of the Interior, to set aside an oil and gas lease executed on August 18, 1913, by A. N. Thomas, guardian of Allie Daney, and also J. J. Eaves as curator of her estate, covering a forty-acre tract of land, to-wit:

The South Half of the Northwest Quarter of the Southwest Quarter, and West Half of the Southwest Quarter of the Southwest Quarter of Section Four (4), Township

Four (4) South, Range Three (3) West, in Carter County, Oklahoma.

on the ground that the lease was procured from the said A. N. Thomas, as guardian of said ward, by fraud.

I further find that the said Allie Daney is a full-blood citizen of the Choctaw Nation under the age of eighteen years, and so enrolled, and that she was and is the owner of said land, and that the oil and gas produced therefrom are reserved by law from alienation, except with the consent of the Secretary of the Interior; that the ward, Allie Daney, has resided all of her life in what is Leflore County, Oklahoma.

That on the 8th day of November, 1905, J. J. Eaves, prior to the erection of the State of Oklahoma, was appointed curator of the estate of the said Allie Daney by the United States Court for the Southern District of the Indian Territory sitting in probate, and the said land, to-wit:

The South Half of the Northwest Quarter of the Southwest Quarter, and the West Half of the Southwest Quarter of the Southwest Quarter of Section Four (4), Township Four (4) South, Range Three (3) West,

being then and there located in the Southern District of the Indian Territory and having been prior to that time allotted to the said Allie Daney and said Allie Daney then and there being the owner of said land.

That after the erection of the State of Oklahoma, said curatorship or proceedings thereof was duly transferred to Love County, Oklahoma, and that the said J. J. Eaves, as such curator, on 18th day of August, 1913, executed an oil and gas lease to J. S. Mullen covering said lands and that J. S. Mullen presented the said oil and gas lease to Dana H. Kelsey, acting in the capacity of Superintendent to the Five Civilized Tribes, for approval.

That on July 24, 1911, A. N. Thomas was appointed by the County Court of Leflore County, Oklahoma, as the guardian of the person and estate of the said minor, Allie Daney, and he immediately qualified and entered upon the discharge of his duties as such guardian, and at the time of the institution of this suit was acting as such guardian.

That on August 18, 1913, the said A. N. Thomas, as such guardian, executed an oil and gas lease to T. H. Dunn and J. Robert Gillam covering said land.

I find as a part of the consideration moving A. N. Thomas to execute said lease, T. H. Dunn and J. Robert Gillam, by T. H. Dunn, transferred to J. J. Thomas for the use and bene-

fit of A. N. Thomas, an undivided one-fourth interest in said oil and gas lease, or in writing agreed that J. J. Thomas should have such interest and it was a secret understanding that it should be for the personal benefit of A. N. Thomas, and to A. M. Funkhouser, Earl McGowan and D. Thomas an undivided one-fourth interest therein, or in writing that they should hold such interest for them, the said T. H. Dunn and J. Robert Gillam retaining or still having a one-half interest in said lease, said assignments or agreements for assignments, or holding for them such interest having been executed at the same time said lease was executed by the said A. N. Thomas and as a part of the same transaction.

I further find that said lease from said Thomas to Dunn and Gillam was also filed with the said Dana H. Kelsey, acting in the capacity as Superintendent of the Five Civilized Tribes, for approval, but that he declined to approve either one of them as long as there was a controversy as to which was the *de jure* guardian of the estate of Allie Daney.

I further find that the said Dana H. Kelsey, acting as Superintendent to the Five Civilized Tribes, suggested to the holders of the respective leases that they organize a corporation and call it the Bull Head Oil Company, the holders of the respective leases each to have one-half of the stock of said company, and that the said J. J. Eaves, as curator of said estate, to join in the said lease executed or to be executed by the said A. N. Thomas, and that after the lease was appraised and its bonus value ascertained and paid, that then he would approve the lease so executed and assigned to the said Bull Head Oil Company for whatever bonus was determined by such appraisement to be paid.

I find that this plan was carried out by the parties with the addition of five acres known as the Gladney tract, which was added to the Bull Head Oil Company's Allie Daney holding, and its value was included in the capital stock of the company in the value of \$2,000 and the Allie Daney lease at \$16,000, making the total capital stock of \$18,000.

The holders of the original lease from J. J. Eaves, as curator, otherwise known as the Mullen's interest, were to and did receive eight thousand dollars of the capital stock of the Bull Head Oil Company.

The holders of the original A. N. Thomas lease, otherwise referred to as the Dunn and Gillam interest, were to and did receive eight thousand dollars of the capital stock of said oil company, L. S. Dolman and Gladney to receive one thousand dollars each of the original stock of the company—Gladney having furnished a lease on five acres not within the Allie

Daney holdings—the Gladney stock not to participate in the voting of the corporation. The stock of the Mullen interest was issued to J. S. Mullen, Errett Dunlap and L. S. Dolman, and the stock representing the Dunn and Gillam interest was issued to T. H. Dunn, as trustee.

Prior to this arrangement, T. H. Dunn had conferred with A. N. Thomas and J. J. Thomas, and McGowen, D. Thomas and Funkhouser advised or explained to them the necessity for reducing their holdings on account of the arrangements suggested by Mr. Kelsey and in accordance with the negotiations which brought about the approval of the lease, so that in place of Thomas having a one-fourth interest it would be a one-eighth interest, and the same arrangement was made by Dunn as to the one-fourth interest of Funkhouser, McGowan and D. Thomas.

Afterwards T. H. Dunn and J. Robert Gillam acquired the interest held in the name of J. J. Thomas, the transaction being negotiated and concluded with A. N. Thomas, and the D. Thomas and Earl McGowan interest or holdings in the stock was sold to E. Dunlap. Afterwards J. Robert Gillam sold his holdings in the stock to Jake Hamon for seventy-five thousand dollars, representing 3266 2/3 shares, of which his wife, Mrs. Gillam, at that time held 1266 2/3 shares.

The defendant, T. H. Dunn, still has his holdings in said company. At the time of the negotiations which brought about the transfer of the Allie Daney lease, executed by A. N. Thomas, guardian, and later joined in by J. J. Eaves, as curator, neither J. J. Eaves, curator, Frank Adams, Errett Dunlap, L. S. Dolman, G. W. Gladney, nor any of the holders of the original J. J. Eaves curator lease knew of any secret agreement on the part of Dunn and Gillam by which A. N. Thomas, as guardian, secured or was to secure any interest in or private benefit from said lease, nor did they have any knowledge or information that would reasonably put them on inquiry so as to ascertain such fact.

The interest held by A. M. Funkhouser, which was 666 2/3 shares, was acquired by E. L. McCain for a valuable consideration and at the time he acquired said stock he had no notice or information that A. N. Thomas, guardian of Allie Daney, or J. J. Thomas or D. Thomas, had or claimed any interest in said lease, or such information or notice as would put him on inquiry. The first he heard of the claim was in July, 1914.

I find also that Jake L. Hamon had no notice of such claim at the time he purchased for value the holdings of J. Robert Gillam.

I find that at the time the lease was executed by J. J. Eaves as curator of the Allie Daney estate he was then and there the regular guardian of her estate, and that when he joined in the A. N. Thomas lease, having first been specifically authorized to that end by the County or Probate Court of Love County, he was then and there the regular guardian of her estate and that when he acted in joining in the lease by executing it, Mr. Dana H. Kelsey, the Superintendent of the Five Civilized Tribes and representative of the Secretary of the Interior as to the initiation of such matters, that the same was done at his suggestion and that when J. J. Eaves as curator acted in joining in the execution of said lease and same was approved by the County or Probate Court of Love County, that this was done at the suggestion of said Dana H. Kelsey, Superintendent of the Five Civilized Tribes, and representative of the Secretary of the Interior; that by the act of the said J. J. Eaves as curator, and the authorization and approval of the County or Probate Court of Love County, placed the oil and gas legal title in Dunn and Gillam to be transferred to the Bull Head Oil Company subject to the approval of the lease by the Secretary of the Interior, and afterwards the bonus fixed by the Secretary of the Interior through the Superintendent of the Five Civilized Tribes, to-wit: two thousand dollars was paid and said lease approved by the Secretary of the Interior.

I hold that this had the effect of putting the oil and gas legal title in the Bull Head Oil Company free from the legal effect of fraud in the execution of the lease by A. N. Thomas as guardian, for he was not the *de jure* guardian of the estate of Allie Daney. J. J. Eaves was the legal guardian of her estate. A. N. Thomas may have been under his appointment the guardian of her person but it is not necessary to pass on that question.

Whilst I find from a fair preponderance of the evidence that there was legal fraud in the execution of the original lease by A. N. Thomas, as guardian, to Dunn and Gillam, by the placing of an interest in J. J. Thomas's name for the personal and private benefit of A. N. Thomas, yet as I have stated, I find that J. J. Eaves was the legal guardian of her estate and that the lease executed by him was the valid lease and when he joined in this A. N. Thomas lease, that carried the oil and gas legal title when it had been authorized by the County or Probate Court of Love County and afterwards approved by that court and afterwards approved by the Secretary of the Interior who approved the lease so joined in by him, and that had the effect of placing the oil and gas legal title in the Bull Head Oil Company free from fraud.

A decree will accordingly be entered against the plaintiff and in favor of all the defendants.

R. L. WILLIAMS, Judge.

Filed Oct. 27, 1920, W. V. McClure, Clerk.

Motion.

Now comes the United States of America, plaintiff, by its attorney L. K. Pounders, Special Assistant United States Attorney, and W. A. Ledbetter, and moves the court to make the following findings, in addition to the findings heretofore made in this cause, to-wit:

(1). That T. H. Dunn held in his name, as trustee, shares of stock in the Bull Head Oil Company, of the par value of Two Thousand Dollars, for the personal and private benefit of A. N. Thomas, from the time the original stock of said company was issued until about the month of September, 1915, at which time he and his partner J. Robert Gillam, purchased the same from A. N. Thomas, and paid him \$3500.00, in money and a Saxon automobile for said stock.

(2). That at the time Dana H. Kelsey suggested the formation of the Bull Head Oil Company and recommended the approval of the oil and gas lease executed by A. N. Thomas to Dunn and Gillam, he did not know that by agreement with T. H. Dunn, A. N. Thomas, D. Thomas, A. N. Funkhouser and Earl McGowan, were to have for their personal and private benefit an interest in the lease; nor did the said Dana H. Kelsey, at the time he recommended the approval of said lease, know that by agreement with T. H. Dunn, A. N. Thomas, D. Thomas, A. N. Funkhouser and Earl McGowan, were to have an interest in the stock of the Bull Head Oil Company, when organized; and the said Dana H. Kelsey testified that had he known of any such private and personal interest on the part of the said A. N. Thomas, D. Thomas, A. N. Funkhouser and Earl McGowan, in said lease and in said stock of the Bull Head Oil Company, he would not have recommended the approval of the lease; that Dunn and Gillam and A. N. Thomas concealed from Dana H. Kelsey and from the Secretary of the Interior, all knowledge of the fact that A. N. Thomas, D. Thomas, A. N. Funkhouser and Earl McGowan were to have an interest in said oil and gas lease and in the stock of the Bull Head Oil Company, and the court finds that the concealment of such fact from said Dana H. Kelsey and said Secretary of the Interior, constituted a fraud on these officers of the government, charged with the duty of determining whether or not the oil and gas lease should be approved;

which fraud renders said lease void, and requires that the same should be set aside and held for naught insofar as Dunn and Gillam are concerned.

(3). The court further finds that at the time the oil and gas lease executed on the 18th day of August, 1913, by A. N. Thomas, guardian of Allie Daney, to T. H. Dunn and J. Robert Gillam, was presented to the county judge of Love County for approval, and at the time the said county judge of Love County ordered and directed J. J. Eaves, as curator of the estate of Allie Daney, to join in the lease to T. H. Dunn and J. Robert Gillam, theretofore executed by A. N. Thomas, said county judge did not know of the secret interest in the lease or in the stock of the Bull Head Oil Company, held by agreement with Dunn and Gillam, for the use and benefit of A. N. Thomas, D. Thomas, A. N. Funkhouser and Earl McGowan, but such fact was concealed from the county judge and County Court of Love County, and the concealment of such fact from the County Court and county judge of Love County, constitutes a fraud upon said court and renders said oil and gas lease void insofar as Dunn and Gillam are concerned.

(4). The court further finds that T. H. Dunn and J. Robert Gillam, with full knowledge of the fraud committed by them in procuring the lease from A. N. Thomas, as guardian of Allie Daney, ratified and confirmed the same, both before the approval of said lease by the Secretary of the Interior, and by the County Court of Love County, Oklahoma, and after such approval; that the incorporators and the first directors of the Bull Head Oil Company were T. H. Dunn, J. Robert Gillam, Errett Dunlap, L. S. Dolman and J. S. Mullen, that immediately after the incorporation of the Bull Head Oil Company, Errett Dunlap was elected president and T. H. Dunn was elected secretary and treasurer, that Dunn, Gillam and their attorney L. S. Dolman, constituted a majority of the incorporators and directors of the company, and that Dunn, as secretary and treasurer, for the company, had the active management and control of the company's business, and the development of the oil and gas lease in controversy; that from the time the company was incorporated up to the time of the trial of this case, Dunn participated actively in the management and control of the company's business, that the Bull Head Oil Company was organized for the purpose of taking over and operating the lease in controversy, that Dunn and Gillam assigned the lease in controversy to the Bull Head Oil Company, and as directors and officers of the Bull Head Oil Company, participated in accepting the same for and on behalf of the Bull Head Oil Company; that T. H. Dunn actively cooperated with Errett Dun-

lap in procuring the approval of the lease by the Secretary of the Interior; that Dunn and Gillam and the Bull Head Oil Company at all times, from the date of the organization of the company, and the assignment of the lease to the company, recognized A. N. Thomas as the guardian of Allie Daney, and paid him, as such guardian, the royalty and bonus provided for in said lease, that they have constantly, from the time said lease began to produce oil in the summer of 1914, up until the present time, accepted the benefits of said lease, and have in all respects ratified and confirmed the same as the lease executed by A. N. Thomas, as guardian of the estate of Allie Daney, and the court holds that the knowledge of Dunn and Gillam of the fraud perpetrated in procuring the lease, is, as a matter of law, imputed to the Bull Head Oil Company, and that the Bull Head Oil Company took said lease, charged with the notice of such fraud and subject to the right of the plaintiff to have said oil and gas lease cancelled and set aside, and the court further holds that by accepting said lease and the benefits thereof, the said Dunn and Gillam and the said Bull Head Oil Company are estopped to deny that A. N. Thomas was the guardian of the estate of Allie Daney, and as such guardian of the estate of Allie Daney, had the right to execute said lease; and the court further holds that under the operation of section 1150 of the Revised Laws of 1910, of the State of Oklahoma, which provides that any person or corporation having knowingly received and accepted the benefits or any part thereof of any conveyance, mortgage, or contract, relating to real estate, shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power of authority to execute the same, the said Dunn and Gillam, and the said Bull Head Oil Company are estopped to deny that A. N. Thomas was on the 18th day of August, 1913, or any time thereafter, the guardian of the estate of Allie Daney.

The court further finds that by reason of the fraud committed by the said T. H. Dunn and J. Robert Gillam in procuring said lease, and the fact that said Bull Head Oil Company took said lease, charged with the knowledge of said fraud, that the same should be set aside and held for naught, and that the said T. H. Dunn and J. Robert Gillam and the said Bull Head Oil Company should be required to account for all oil or the proceeds thereof derived from the premises covered by said oil and gas lease.

(5). The court further finds that the fact that J. J. Eaves, as curator of the estate of Allie Daney, on the 26th day of January, 1914, attached his name to the oil and gas lease ex-

ecuted on the 18th day of August, 1913, by A. N. Thomas as guardian of Allie Daney, to J. Robert Gillam and T. H. Dunn, and the fact that said J. J. Eaves as such curator acknowledged the execution of said oil and gas lease, did not make said oil and gas lease a binding lease on the estate of Allie Daney, and did not extract or remove from said lease the fraud perpetrated by Dunn and Gillam in procuring the execution of the same by the said A. N. Thomas; that the signing and acknowledging of said lease by said J. J. Eaves, imparted no force or validity to said lease as a lease executed by him as curator of the estate of said Allie Daney, for the reason that said J. J. Eaves, as such curator, did not join in the execution of said lease by any words of grant, leasing or letting, binding upon him as curator of the estate of said Allie Daney.

(6). The court further finds that said lease is and always has been fraudulent and void as against the said T. H. Dunn and J. Robert Gillam, and that a proper order and decree should be drawn requiring them to account for the full value of all oil or the proceeds thereof taken from said premises, less the actual expense of developing and operating said property, and that said lease is likewise void as against the Bull Head Oil Company, and that the Bull Head Oil Company and each and all of its stockholders and directors should be required to account for all oil or the proceeds thereof, received by them, except the actual amount necessary for the development and operation of said lease.

UNITED STATES OF AMERICA,

By L. K. POUNDERS,

Special Assistant U. S. Attorney,

and W. A. LEDBETTER,

Attorneys for Plaintiff, United States of America.

Filed Dec. 7, 1920. W. V. McClure, Clerk.

Stipulation of Revivor.

Whereas, the defendant Jake L. Hamon died intestate at Ardmore, in Carter County, Oklahoma, on the 26th day of November, 1920; and

Whereas, Frank L. Ketch was on the 30th day of Nov., 1920, duly appointed the administrator of the estate of said Jake L. Hamon, deceased, and made bond and qualified as such administrator.

Now, Therefore, it is agreed and stipulated that the above and foregoing cause be revived against said Frank L. Ketch, administrator of the estate of said Jake L. Hamon,

deceased, and that the cross complaint insofar as joined in by Jake L. Hamon as a cross petition, be likewise revived in the name of Frank L. Ketch, administrator of the estate of said Jake L. Hamon, deceased.

Made and dated this 25th day of March, 1921.

FRANK L. KETCH,
Administrator of the Estate of Jake
L. Hamon, deceased.

JOHNSON & McGILL,
WM. G. DAVISSON,
Counsel for T. H. Dunn and J. Robert
Gillam.

L. K. POUNDERS,
W. A. LEDBETTER,
Counsel for United States of
of America.

GEO. S. RAMSEY,
F. M. ADAMS,
Counsel for Bull Head Oil Company
and all the other defendants
and cross plaintiffs.

Filed Mar. 28, 1921, W. V. McClure, Clerk.

Order of Revivor.

This cause came on for further hearing on the 9th day of April, 1921, at Muskogee, Oklahoma, the same being a regular day of a term of this court at Muskogee, Oklahoma, Honorable Robert L. Williams, Regular Judge, presiding, on the following stipulation of the parties, to-wit:

Stipulation of Revivor.

Whereas, that defendant Jake L. Hamon died intestate at Ardmore, in Carter County, Oklahoma, on the 26th day of November, 1920, and

Whereas, Frank L. Ketch was on the 30th day of November, 1920, duly appointed the administrator of the estate of said Jake L. Hamon, deceased, and made bond and qualified as such administrator.

Now, Therefore, it is agreed and stipulated that the above and foregoing cause be revived against said Frank L. Ketch, administrator of the estate of said Jake L. Hamon, deceased, and that the cross complaint is so far as joined in by Jake L. Hamon as a cross petition, be likewise revived in the name

of Frank L. Ketch, administrator of the estate of said Jake L. Hamon, deceased.

Made and dated this day of March, 1921.

FRANK L. KETCH,
Administrator of the Estate of Jake
L. Hamon, deceased.

JOHNSON & McGILL,
WM. G. DAVISSON,
Counsel for T. H. Dunn and J. Robert
Gillam.

W. A. LEDBETTER,
L. K. POUNDERS,
Counsel for United States of
America.

GEO. S. RAMSEY,
F. M. ADAMS,
Counsel for Bull Head Oil Company
and all the other defendants
and cross plaintiffs.

And the court having considered the same,

It Is Hereby Ordered, Adjudged, Considered and Decreed that the plaintiff's cause be, and the same is hereby revived against Frank L. Ketch, administrator of the estate of Jake L. Hamon, deceased.

And It Is Further Ordered, Adjudged, Considered and Decreed that Frank L. Ketch, administrator of the estate of Jake L. Hamon, deceased, be, and he is hereby made a party to said cross petition or counter claim, and the cross petition or counter claim is hereby revived insofar as Jake L. Hamon, deceased, is concerned, in the name of Frank L. Ketch, as administrator.

Made and ordered entered at Muskogee, Oklahoma, on this 9th day of April, 1921.

R. L. WILLIAMS, Judge.

Filed Apr. 9, 1921, W. V. McClure, Clerk.

Final Decree.

This cause came on for hearing at the October, 1919, term at Ardmore, Oklahoma, Honorable Robert L. Williams, regular judge, presiding, when the plaintiff appeared by and through its counsel of record, and the defendants and cross plaintiffs appeared by their counsel of record and all the evi-

dence was heard. Whereupon, by agreement of counsel the court postponed hearing the argument until a later date and thereafter heard the argument of counsel at Ardmore and took the case under advisement until the day of October, 1920, the same being a regular day of a term of this court, at Muskogee, Oklahoma; whereupon the court filed a memorandum opinion finding the issues in favor of defendants and cross plaintiffs and against the plaintiff, to which written findings reference is here made, and to all of which findings adverse to the plaintiff the plaintiff excepted at the time and still excepts, and thereupon the court continued the case until a later date to be subsequently fixed by the court, for the settling and entering of a final decree, and in the meanwhile plaintiff filed its motion for other and further findings of fact, and the court, having fixed the 7th day of June, 1921, the same being a regular day of the term of this court, at Hugo, Oklahoma, the day for the hearing of plaintiff's motion for additional findings and the rendition and entry of a final decree, and the parties and their counsel having been notified, the plaintiff on this date, to-wit: the 7th day of June, 1921, appeared by its counsel of record, and the defendants and cross plaintiffs appeared by their counsel of record. Whereupon the court announced its additional findings:

(1) That T. H. Dunn held in his name as trustee shares of stock in the Bull Head Oil Company of the par value of Two Thousand (\$2,000.00) Dollars, for the personal and private benefit of A. N. Thomas from the time the original stock of said company was issued until sometime in the year 1915, at which time he and J. Robert Gillam purchased the same from A. N. Thomas and paid him therefor the sum of Three Thousand Five Hundred (\$3,500.00) Dollars in money and a Saxon automobile.

(2) That at the time Dana H. Kelsey suggested the formation of the Bull Head Oil Company and recommended the approval of the oil and gas lease executed by A. N. Thomas as guardian to Dunn & Gillam and afterwards joined in by J. J. Eaves as curator, said Kelsey had no knowledge of the agreement between T. H. Dunn, A. N. Thomas, D. Thomas, and A. N. Funkhouser and Earl McGowan by which they were to have personal and private benefits in said lease, nor did the said Dana H. Kelsey at the time he recommended the approval of said lease have knowledge of such agreement that thereby the said A. N. Thomas, D. Thomas, A. N. Funkhouser and Earl McGowan were to have any interest in the stock of the said Bull Head Oil Company after its organization.

(3) That at the time the oil and gas lease, executed on or about the 19th day of August, 1913, by A. N. Thomas as

guardian of Allie Daney, to T. H. Dunn and J. Robert Gillam was presented to the county judge of Love County for approval and at the time the said county judge of Love County ordered and directed the said J. J. Eaves, curator of the estate of Allie Daney, to join in said lease, said county judge did not have and knowledge of any interest on the part of said guardian, A. N. Thomas, D. Thomas, A. N. Funkheuser and Earl McGowan.

(4) That T. H. Dunn, at the organization of the Bull Head Oil Company, was elected secretary and treasurer and acted in that capacity for a considerable period, and he was also, during such time, a director.

(5) The court further finds that when J. J. Eaves, curator of the estate of Allie Daney, on or about the 26th day of January, 1914, subscribed his name to the oil and gas lease of date of August 19, 1913, by A. N. Thomas as guardian of Allie Daney to J. Robert Gillam and T. H. Dunn, said Eaves subscribed his name as curator, it being the intention that said Eaves should so execute said lease, in joining therein, as to execute a valid oil and gas lease and that was the then present intention on the part and so understood and that in so executing it, after it was approved by the County Court of Love County and by the Secretary of the Interior, would operate to make said oil and gas lease a binding lease on the estate of Allie Daney, and that the execution by said J. J. Eaves, as curator and approval by the County Court of Love County, and by the Secretary of the Interior was free from fraud and the same operated to make said lease a valid lease, said lease being for a term of ten (10) years from the date of the approval by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities, and covering the following described land, to-wit:

The South Half (S2) of the Northwest Quarter (NW4) of the Southwest Quarter (SW4), and the West Half (W2) of the Southwest Quarter (SW4) of Section Four (4), Township Four (4) South, Range Three (3) West, containing forty (40) acres, more or less, and being and lying in the County of Carter, State of Oklahoma.

(6) That the said T. H. Dunn owns all of the stock standing in his name in said company and that transferred by him to his wife was without consideration and I find from the evidence that the said T. H. Dunn is solvent, but I am unable to determine from the evidence as to whether or not the said J. Robert Gillam is solvent; and

(7) I also find that the stock transferred by the said J. Robert Gillam to his wife was without consideration.

All other requests for additional findings are overruled, to which action of the court in not making all the findings as set forth in plaintiff's motion herein, the plaintiff in open court duly excepted.

It Is Therefore Ordered, Considered, Adjudged and Decreed that the plaintiff and its ward, Allie Daney, take nothing in this case and that the plaintiff's case is hereby adjudged and decreed dismissed, to which judgment and decree plaintiff excepts.

It Is Further Ordered, Adjudged, Considered and Decreed that the cross bill of the defendant, Bull Head Oil Company, a corporation, J. S. Mullen, Errett Dunlap, Don Russell, F. M. Adams, and Frank L. Ketch, as administrator of the estate of Jake L. Hamon, deceased, be and the same is hereby dismissed, to which judgment and decree the aforesaid defendants except.

It Is Further Ordered, Adjudged and Decreed, that the plaintiff pay all cost incurred by it in this action, and that defendants pay all cost incurred by them, and the cost is decreed taxed accordingly. To which action of the court and every part thereof, the plaintiff separately excepts, and as to the court's failure to decree a reformation of the lease as prayed by the defendant oil company, it and the other defendants separately except.

Whereupon in open court and in the presence of the attorneys for all the defendants, the plaintiff prayed that it be granted an appeal from the decree rendered against it herein and every part thereof to the United States Circuit Court of Appeals for the Eighth Circuit, which prayer is by the court granted, said prayer being granted and made in open court when said decree was rendered.

It Is Therefore Ordered, Adjudged and Decreed by the Court that the plaintiff, United States of America, be and it is hereby granted an appeal from said decree and every part thereof to the United States Circuit Court of Appeals for the Eighth Circuit, and the plaintiff, United States of America, to that end having moved that the decree be superseded and the court orders that said judgment be and is hereby superseded without bond.

And thereupon in open court and at the time the court announced its aforesaid decree, come now all the defendants herein, T. H. Dunn, N. E. Dunn, Don Russell, J. Robert Gillam, Mrs. J. Robert Gillam, Errett Dunlap, Frank L. Ketch, administrator of the estate of Jake L. Hamon, deceased, E. L. McCain, J. S. Mullen, F. M. Adams, and the Bull Head Oil Company, and each and all except to that part of the decree

refusing to grant the said defendants cross-relief so as to reform the said Departmental oil and gas mining lease so as to insert in the body thereof and in the granting and demising clause thereof the following: "J. J. Eaves, curator of Allie Daney, a minor," and in open court and in the presence of counsel for all the parties pray a special appeal to the United States Circuit Court of Appeals for the Eighth Circuit from that part of the judgment and decree of the court refusing to reform said Departmental oil and gas mining lease as prayed for and as above recited, which prayer for appeal is allowed by the court and defendants' appeal bond fixed in the sum of One Thousand (\$1,000.00) Dollars, to be approved by the court.

Made and ordered entered this 7th day of June, 1921, at Hugo, at 2:30 P. M., Oklahoma, the same being a regular day of the term of this court at Hugo, Oklahoma.

R. L. WILLIAMS, Judge.

Filed June 7, 1921, W. V. McClure, Clerk.

In the United States District Court for the Eastern District of Oklahoma.—United States of America, Plaintiff, vs. T. H. Dunn, et al., Defendants.—No. 2591, Equity.

Statement of the Evidence.

Be It Remembered, that the testimony hereinafter set forth is all the testimony essential to the decision of the questions presented by the appeals in this case, the parts of the testimony not deemed essential to the decision of the questions involved in this appeal having been omitted.

The trial of the case having been begun before the Honorable Robert L. Williams, United States District Judge, at Ardmore on the 22nd day of October, 1919, the following testimony was produced:

A. N. THOMAS, witness on behalf of the plaintiff, testified:

My name is A. N. Thomas; I have lived at Talihina, Oklahoma, 33 years; was appointed guardian of Allie Daney, full-blood Choctaw Indian minor, somewhere, I think, along in 1909, but the court records will show; I have been acting as her guardian continuously since that time; the royalty money due her under this lease was collected by the Indian Department at Muskogee; the Department has recognized me as guardian of Allie Daney at all times since the execution of this lease; I did not find out that J. J. Eaves had signed the lease which I had executed until after the lease had gone to

Washington, and no one suggested to me to join with Eaves in signing the lease, and I "did not know anything about it until sometime afterwards."

The Departmental oil and gas mining lease executed by the witness to T. H. Dunn and J. Robert Gillam on the 19th day of August, 1913, under the order and direction of the County Court of LeFlore County, Oklahoma, is set out as Exhibit "A" to plaintiff's bill and was introduced in evidence, with all the terms, provisions thereof, certificates, endorsements, notations thereon appearing as shown by Exhibit "A" to the plaintiff's bill, which exhibit is here referred to without being re-printed.

Witness A. N. Thomas was in Talihina on the 19th day of August, 1913, and had been there two or three days before; a lawyer by the name of Funkhouser came to him and stated that he had some friends in Ardmore who wanted to secure this lease, and for him (Thomas) not to do anything in the way of letting the lease until he (Funkhouser) came back, that he would bring some friends back with him from Ardmore and there would be something made out of the lease; that Mullins or some one from his office stated over long distance phone that they were sending a man over and wanted to procure a lease on the land and would see him (Thomas) about it Sunday; that E. A. McGowan who lived at Talihina was endeavoring to get the lease and that McGowan had been negotiating with him (Thomas) for the lease; that Funkhouser said not to let McGowan have the lease until he came back from Ardmore; Funkhouser came back three or four days later to see him about the lease and introduced Mr. Dunn to him on the same morning and Dunn mentioned that they were there for the purpose of securing the lease; that Mr. Dunn wanted to secure the lease and remained until late in the afternoon, and they talked the matter over and Mr. Dunn finally consented to "sign" him one-fourth interest in the lease, and Dunn suggested that he (Thomas) being the guardian, it could not be carried in his (Thomas') name, he would either put in his wife's name or his father's name; that there were negotiations between McGowan and Funkhouser about the lease; McGowan came in to see him (Thomas) that morning and knew that Dunn was there to get the lease; that McGowan got very sore at him (Thomas) for starting out listening to Mr. Dunn and Mr. Funkhouser; that he did not know right at that time that Mr. McGowan and Mr. Funkhouser and D. Thomas had an interest in the lease, but he learned it later by seeing their contract; that he closed his negotiations with Dunn late one afternoon; that Dunn suggested that in order to throw some men off the track that were trying to secure the lease, that he (Dunn) was going south on what was known as number five,

and would double back on the night train, and in the meantime they phoned the county judge at Poteau to have him down early next morning so we could get the lease approved and get back on number five and get the lease off; that Dunn did go south on number five and returned on the night train; that he and Dunn appeared at Poteau early next morning and that they presented the lease to the county judge and he approved it; that the county judge had a telephone conversation with other parties about the lease, but he went ahead and approved this lease.

Witness A. N. Thomas testified that he saw the contract between Dunn and Gillam and E. A. McGowan and A. M. Funkhouser and D. Thomas, same being dated August 18, 1913. Plaintiff introduced copy of contract as plaintiff's "Exhibit 2," and defendants admitted same to be correct, which contract reads as follows:

"This agreement, made and entered into this 18th day of August, 1913, by and between T. H. Dunn and J. Robert Gillam, parties of the first part, and D. Thomas, A. M. Funkhouser and E. A. McGowan, parties of the second part;

Witnesseth, That for and in consideration of the legal and other services rendered by said parties of the second part in assisting and securing for said parties of the first part a lease contract on the following described real estate, to-wit:

S2 of NE4 of SW4; and W2 of SW4 of SW4 of Section 4, Twp. 4 South, Range 3 West, containing in all 40 acres.

For mineral, oil and gas purposes, said parties of the first part agree and bind themselves jointly and severally to keep and hold for the sole and exclusive benefit of the said parties of the second part one full fourth interest in and to said above described lease contract guaranteeing to said parties of the second part one-fourth of any and all the net proceeds and profits which may accrue to said parties from the said above described lease contract, and that no sale or transfer of said lease contract or any part thereof shall be made by the said parties of the first part without the written consent of each and all of the parties of the second part.

In witness whereof, the parties to this contract have hereunto set their hands the day and year above mentioned.

Dunn & Gillam
By T. H. Dunn."

A. N. Thomas further testified that his interest in the lease was carried in the name of his father J. J. Thomas, at the suggestion of Mr. Dunn; that the contract was signed "Dunn & Gillam" by Dunn, and was written by Funkhouser; that he had possession of the contract from its date in 1913 to July 20, 1915, the day he sold out. Witness further testified that the contract called for one-fourth interest in the 40-acre lease to be held for benefit of A. N. Thomas, but to be held in his father's name; that neither he (A. N. Thomas) nor Mr. Dunn told the county judge anything about the two contracts —one giving separate interest to J. J. Thomas and another interest to D. Thomas, Earl McGowan and A. M. Funkhouser; that these contracts were not mentioned in any way; that the county judge knew nothing about the existence of those two contracts; that witness knew better than to let him know; that witness came back to Talihina from Poteau and he does not know where Dunn went, after the lease was executed; Mr. Dunn said he was going to forward the lease on to Muskogee; that Mr. Gillam would be there waiting for it and would take it and present it to Mr. Kelsey; that he did not know whether Dunn forwarded it to Muskogee or not, but he evidently did, it went there, and it was approved at Muskogee about six months afterwards; that a controversy arose over this lease and another lease on the same land executed by J. J. Eaves, curator; witness was in Muskogee during this controversy, during the controversy at Muskogee over the two leases between August, 1913, and January, 1914; Dunn was in Talihina on three trips and told him (A. N. Thomas) about the controversy; Dunn said when the controversy came up about the Eaves lease, he had to agree to divide the lease with Mullin, and Kelsey (the Indian Agent) told him (Thomas) he would not approve the Eaves lease, but if they would get together he would approve the lease executed by him (Thomas); that Dunn told witness at Talihina they would have to make a division with Mullin and give Mullin one-half interest in the lease and Dunn suggested that he (Thomas) would have to reduce his interest in the lease from one-fourth to one-eighth interest. That they were to organize a company named Buil Head Oil Company on account of there being so many bull-headed men in it; that he (Dunn) would carry Thomas' stock and Thomas would have \$2000.00 stock in the company; that he would carry it as trustee in his (Dunn's) name; the capital stock of the company was to be \$18,000.00; that \$2,000.00 was to go to Gladene; that there was a five-acre tract that was to be taken in owned by Gladene, and that he (Thomas) was to have no interest in the \$2,000.00 to be issued for that interest; that he (witness) consented to this arrangement; that he discussed with Dunn in the drug store the change in the interest he (Thomas) was to have and that Dunn sug-

gested that they go there and explain the matter to A. N. Thomas' father about the organization of the company, so that he would see that A. N. Thomas' interest was taken care of; that they did discuss the matter with A. N. Thomas' father; Dunn wanted him (A. N. Thomas) to surrender the contract he had, but that he said "No, I will just keep that;" that agreement was in writing and that he kept it in his safe but lots of times he had it in his pocket; that other people saw the contract; S. L. Chowning saw it; D. Thomas saw it; that D. Thomas is an uncle of A. N. Thomas, and McGowen is his cousin by marriage.

Witness further testified that on the 23rd day of October, 1914, he wrote a letter to Mr. Dunn and mailed the original to T. H. Dunn, Ardmore, Oklahoma, and plaintiff offered in evidence a carbon copy of this letter as plaintiff's "Exhibit 3," which letter is in words and figures as follows, to-wit:

October 23/1914.

"Mr. T. H. Dunn,
Ardmore, Oklahoma.

Dear Friend:

I have been thinking for some time of writing you regarding our matter, and have come to the conclusion that it is time that our matter was fully settled. I know that you and Mr. Gillam are wanting to hold the matter, so I want you to either purchase or sell same for me. I have had a great deal of trouble caused from this matter, and as I live here and cannot be there, I think it best that this matter be fully settled. You will certainly appreciate the fact that I have given you a clean deal at all times. I know that this matter is very valuable, and that same can be sold at a good price if offered to parties that are wanting this kind of business. My policy has always been to do the right thing with those that I was connected with, and so far I have done so with you, and only want the same in return. I do not want same disposed of until I get the price that same is worth. So please make arrangements for me and write me when you are ready, and I will come over and bring the matter with me.

Very truly,
(Signed) Atha N. Thomas."

That he received an answer from that letter from Mr. Dunn, the answer being dated November 3rd, 1914, which letter is plaintiff's Exhibit 4, and is in words and figures as follows, to-wit:

"T. H. Dunn

J. Robert Gillam

Dunn & Gillam

Financial Agents

Lands, Loans and Investments.

Ardmore, Oklahoma, 11/3/1914

Mr. A. N. Thomas,
Talihina, Oklahoma.

Dear Atha:

This will acknowledge receipt of your favor of a later date, which was received before I left the city. I would have answered had I not been forced to neglect very important matters.

The burden of keeping the oil boat afloat has fallen on a very few of us and it has required the most of my time day and night, to the neglect of my own private business. You nor any one else can realize what a strenuous fight we have made to keep the Standard Oil Company from taking the entire field away from the people. These conditions exist throughout the state.

Atha, you ought to realize that the matter you referred to is one that requires a personal interview, and I will make an effort to visit you before the first of the year. In the meantime, if it is possible, I would like for you and your father to come and be my guests for a day or two. Mr. Gillam has a comfortable car and I feel quite sure your father would enjoy the trip to the field, and it will be a pleasure for us to take you. I will be out of town most of the time till after the 7th, let me know what day you can come and I will make it a point to be home.

Yours truly,

(Signed) T. H. Dunn."

Witness testified that after he received this letter from Dunn he had a personal interview with him about the subject matter of the two letters—the sale of the stock; talked with Dunn two or three times; that he received another letter from Mr. Dunn, dated March 21, 1915, which is marked plaintiff's "Exhibit 5," in this letter, among other things, Dunn said:

"There is not a thing of interest that I can write you, I only wish I could and that is why I have had nothing to say. The oil field is dead as a door nail, we have only run one tank of oil this year so far and if I could see one bright spot ahead I would say so. Most of the companies are having to make assessments to meet their obligations and expenses. I have been terribly embarrassed owing to the

position I have held with the different companies that I am interested, none of whom have money to pay expenses with and so long as they can make no sales it cannot improve."

That witness made a trip with Lunsford to Ardmore, and Dunn took witness and Lunsford out east of town to look at a farm in regard to trading it for the stock, and Dunn said he was fixing to go to Florida or California and left the next morning, that up to this trip he and Dunn had not come to an agreement; that he did come to an agreement with Mr. Gillam; that he and Mr. Bulgin came over to Ardmore and made an agreement with Gillam to sell the \$2000 stock in the company, then held in Dunn's name as trustee for \$1500 cash and for a farm; that they entered into an escrow agreement which was drawn by Mr. Bulgin and is in words and figures as follows. to-wit:

Escrow Agreement.

"This agreement made and entered into by and between John J. Thomas of Talihina, LeFlore County, Oklahoma, and P. C. Dings of Ardmore, Oklahoma, that the warranty deed hereto attached, whereby said P. C. Dings grants, bargains, sells and conveys to said John J. Thomas, the following described land, to-wit:

The Northeast Quarter of the Southeast Quarter and the East Half of the Southeast Quarter of the Southeast Quarter of Section 35; and the Southeast Quarter of the Northeast Quarter, less 3.08 acres A. & C. Ry. Section 35; and the South Half of the Southwest Quarter of the Northwest Quarter less 2.25 acres A. & C. Ry. Section 36, and the East Half of the Southeast Quarter of the Southeast Quarter and Southwest Quarter of the Southeast Quarter of Southeast Quarter of Section 26 and the Northeast Quarter of the Northeast Quarter of Section 35, all in Township 4 South, Range 2 East, being and lying in Carter County, Oklahoma.

And, that the release or assignment of said John J. Thomas to all his right, title and interest to all stock and assets of The Bull Head Oil Company and of all his right and title in and to the property and assets of said Company, to P. C. Dings, which deed and release or assignments are hereto attached, are to be held in escrow Guaranty State Bank of Ardmore, Oklahoma, to be delivered, the release or assignment to said P. C. Dings and the said deed to John J. Thomas upon the following condition:

Upon a loan or loans in the sum of Two Thousand Dollars made to said John J. Thomas, upon the land above

described, within sixty days of the receipt of the application of said John J. Thomas, for the loan upon said land by W. A. Wolverton, Ardmore, Oklahoma.

It being further agreed between the parties hereto that not less than Fifteen Hundred Dollars of said loan is to be for a term of not less than five years and not more than five hundred dollars of said loan to be payable less than three years, provided however that the whole of said loan at the option of said W. A. Wolverton, may be made for a period of ten years; and it being further provided that the commission notes shall be payable in one, two and three years, the said loan to bear 6 per cent interest per annum and the commission to be two per cent interest per annum.

It is agreed by and between parties hereto that time is of the essence of this contract and that if said loan is not made within the time above provided this contract to be null and void.

In witness whereof the parties hereto have subscribed their names this the 20th day of July, 1915.

John J. Thomas,
By R. G. Bulgin, Atty.
P. C. Dings."

That a warranty deed was attached, signed by P. C. Dings and grants to John J. Thomas a certain tract of land therein described; that the release or assignment of John J. Thomas to all his right, title and interest to all stock and assets of the Bull Head Oil Company, and his rights and title in and to the assets of the company to P. C. Dings; that the deed and the assignment of the lease were to be held in escrow in the Guaranty State Bank to be delivered, the release or assignment to P. C. Dings and the deed to John J. Thomas on condition that a loan in the sum of \$2000.00 be made to John J. Thomas on the land within sixty days.

Witness further testified that John J. Thomas did not sign the contract; that Mr. Bulgin signed his name for him; that John J. Thomas did not know anything about this paper being signed at the time it was signed and did not know about it until two or three days afterwards, that he did not consult J. J. Thomas in any way about the terms of the trade, because it did not belong to him, but belonged to A. N. Thomas, that J. J. Thomas had no interest in it whatever and never did have any interest in it, that Dunn & Gillam transferred the land to Dings in order to have the transfer made in Dunn's absence, that Dings executed the deed to his father J. J. Thomas and that the \$2000 loan was procured on the land; the mortgage

securing the loan was signed by J. J. Thomas and his wife, that two cashier's checks, one for \$1000 and one for \$500.00 was delivered by P. C. Dings to A. N. Thomas, the checks were delivered July 20, 1915, that the next evening after the escrow agreement was signed he (A. N. Thomas) cashed these checks at the First National Bank of Hugo by endorsing on the back the name of J. J. Thomas and his own name, A. N. Thomas; that J. J. Thomas never got any part of the proceeds of the checks, and that A. N. Thomas got all the proceeds of the checks, that a check for \$2000.00 being proceeds of the loan was sent to Talihina and that it was appropriated by A. N. Thomas, and J. J. Thomas got no part of it, that the escrow agreement called for an assignment of the J. J. Thomas interest in \$2000 stock in the Bull Head Oil Company held in the name of T. H. Dunn, trustee, that the escrow agreement was executed late at night and witness was going to try to get away that night and the assignment was mailed over to witness next day and he got his father to sign it, the escrow agreement was signed before the assignment of the interest in the stock was signed. This assignment is in words and figures as follows:

State of Oklahoma, County of LeFlore, ss.

For and in consideration of the sum of One Dollar and other good and valuable considerations, the receipt of which is hereby acknowledged, I hereby sell, assign, transfer and convey to P. C. Dings of Ardmore, Oklahoma, all my right, title and interest in and to all stocks or assets of whatsoever nature belonging to me in the Bull Head Oil Company or by virtue of the ownership of the stock sold, certificate #14 for (2000) two thousand shares in the Bull Head Oil Company now held in trust for me by T. H. Dunn of Ardmore, Oklahoma. And the said T. H. Dunn is hereby authorized and instructed to cancel the said certificate #14 and issue new stock to P. C. Dings.

Witness my hand this the 19th day of July, 1915.

John J. Thomas.

That witness received a letter signed J. Robert Gillam by typewriter, the letter was received in the same envelope with the blank assignment, this letter reads as follows:

Dear Friend:

Enclosed find assignment for J. J. to sign and acknowledge before a Notary Public.

Bring the contract signed by us under date o' August 18, 1912.

I have telephoned for the loan man but could not get him, but will continue and try and get him over next Tuesday. I want it understood that we do not guarantee to secure any certain amount of loan. I have not been able to see my party about the additional \$500.00, making a total of \$1500.00 and the Saxon car and farm, however come over and the deal will be closed.

Yours truly,

(Signed) J. Robert Gillam.

That the contract referred to was the contract witness had with Dunn & Gillam for the interest in the 40-acre lease, providing for his one-fourth interest in the lease taken in the name of witness' father; that witness did not remember whether the contract of August 18, 1913, was sent to Mr. Gillam or brought by him, but that they "took it up;" that contract was put with the escrow agreement, the contract witness had with Dunn & Gillam for an interest in the lease; that witness did not deliver the contract until he got the money; that Mr. Dings or Mr. Gillam one or the other got the contract; that J. J. Thomas signed the transfer of stock, witness took it to him and he signed it in witness' presence and that it was either mailed back to Ardmore or cleared at the bank, witness saw contract first time yesterday since it was sent it; that a Saxon car was given witness by Gillam in addition to \$3500.00.

Witness further stated that his father did not at any time have any interest in the lease or in the land or in the money realized from the land or the \$1500.00 or the Saxon car which Gillam turned over to him; that all this was paid and turned over to witness in pursuance of agreement he had with Mr. Dunn; that Funkhouser is dead and D. Thomas is dead.

On cross examination A. N. Thomas testified:

Q. Mr. Thomas, when you first learned that J. J. Eaves had executed a lease like you had executed to Dunn and Gillam, did you make any protest to the Indian agent, or to Dunn and Gillam?

A. I think you will find a letter on record in the Muskogee office I did not want to join in any agreement with them.

Q. You say you wrote a letter of that kind. A. Yes, sir.

Q. Were you in Muskogee when you testified some of you were there at the Department and Eaves signed a lease at that time? A. No, sir.

Q. When were you advised that the Department had suggested a settlement of the matter between Mullen and Dunn and Gillam?

Judge Williams: He testified that Mr. Kelsey told him, made the suggestion himself.

A. I got the information from Kelsey.

Q. You got that from Mr. Kelsey? A. Yes, sir.

Q. After that lease was signed by Eaves and approved by the Department, you resigned as guardian? A. No, sir.

Judge Williams: You were re-appointed as guardian?

A. Yes, sir.

Judge Williams: How came you to be re-appointed?

A. By the suggestion of the—I don't know—

Q. Didn't Mr. Kelsey suggest to you to resign and be re-appointed so all questions as to your authority to act as guardian be removed? A. I don't know why it was.

Q. But you did, I believe?

A. I did resign and they re-appointed me on that day.

Q. When was that, along sometime in 1914?

A. I suppose so.

Q. Have you got those letters of guardianship with you?

A. No, sir, they are at Poteau—I mean at Talihina.

Q. Were you advised that the lease was going to be assigned to the Bull Head Oil Company? A. Yes, sir.

Q. You did not make any objection to that?

A. If I did, the Muskogee office has it.

Q. The record will show it? Yes, sir.

He did not know at the time Dunn was at Talihina that D. Thomas was to have an interest in the lease; they did not consult him about that; D. Thomas was his uncle; witness talked with his father about holding one-fourth interest in the lease in his father's name for witness' benefit; that he talked with his father after he got the written agreement; witness instituted suit in the District Court of Carter County, as guardian against most of the defendants in this case about a year and half ago; Mr. Ledbetter was attorney for witness in that matter; the first time witness saw Mr. Dunn was when he came to Talihina the day that Funkhouser returned from Ardmore; witness had not agreed with Funkhouser about the lease; McGowan was trying to secure the lease; never went far enough in deal with McGowan to agree on what McGowan was to pay, but he was to have something; McGowan told witness there would be lots of money made out of the lease and witness would be included before it was completed; witness contemplated making lease to McGowan but the plan was never carried out because Mr. Dunn came there; witness was in his store when Funkhouser introduced Dunn to him; Mr. Dunn offered to assign witness one-fourth interest and there was a one-fourth interest assigned to witness; Mr. Funk-

houser drew up the contract but he could not say whether Funkhouser was present at the time the agreement was reached or not, but it was understood that there was a one-fourth interest to be assigned to witness; the lease was to be drawn upon a departmental form in which she (Allie Daney) was to get one-eighth royalty; Mullen's man was there and wanted the lease, he offered \$1.00 per acre bonus for it; the agreement was that witness was to have one-fourth interest in this 40-acre lease in the Healdton field; interest was made out to J. J. Thomas in writing signed by Dunn & Gillam by T. H. Dunn; witness saw Funkhouser's copy of the contract between D. Thomas, Funkhouser and McGowan; Funkhouser told him he had an interest, this was three or four months after, up to that time did not know Funkhouser had an interest; did not know that D. Thomas had an interest; saw the contract about two months afterwards; witness kept his contract in his safe; did not make a copy of other contract with the parties; after he had executed the lease he went with Dunn that night to Poteau and got there early in the morning and the judge approved the lease; witness was over here at Ardmore a number of times; first trip over here witness came with McGowan and D. Thomas and went out to look over the field; Dunn phoned witness to go to Muskogee and meet Mr. Dolman and Gillam at the Severs Hotel; Kelsey told witness after he got there that there was another lease come in and he could not approve this other lease, but would approve witness' lease; that he did not approve either lease until the controversy was settled; does not know about any agreement made by Mullen by which witness was to resign or by which the lease executed by witness was to be signed by the curator, Eaves; was not informed by Kelsey and others that his appointment was void; did not think at the time he was appointed that he could get to handle all the money from the lease; the contract specified where it was to be paid and everything through Kelsey's hands; did not think he could handle it as guardian, and did not try to get the money as guardian; did not talk to Dunn about it; Dunn told witness he understood he could handle the funds, but did not suggest that deposit of funds in bank would help witness' credit; Dunn talked with witness about conflict over lease and said Mr. Kelsey would not approve this other lease, but would approve witness' lease and in order to get the thing adjusted they would have to make division with Mr. Mullen; would have to give Mullen one-half interest in lease; Dunn did not come to see him as to whether he could resign or would consent to let the curator sign lease with witness; Dunn came to see if division would be satisfactory, did not remember whether he consulted his father or not. The assignment for his father

to execute came to witness after he had been paid \$1500.00; that was mailed over there next morning; the letter was not a manufactured letter; was not gotten up recently; supposed it was written by Gillam; the letter came with the assignment which witness' father was to sign; witness did not bring the assignment over when he came to close the deal; witness' lawyer, Bulgin, did not write the letter; Mr. Dings gave witness check a little after dark for \$1500.00; it was one check; the assignment of the stock was to be mailed and he gave witness cashier's check in advance, but the agreement had been taken up and turned over to Mr. Dings down at Gillam's office; delivered agreement to Mr. Gillam; Dings was there holding the papers in escrow; the \$1500.00 was not part of the money from the mortgage on the land, witness first came here to sell stock; tried to sell it; came over with Lunsford; came to see about selling it; Dunn and Gillam offered to give witness this land for his stock; but witness would not take it; was not satisfied, did not consult his father about it; the land was not worth as much as the 2000 shares of stock in the company; witness' father did not send Bulgin to Ardmore; witness took him there; witness did not sign father's name to escrow agreement; they did not want witness to sign that agreement because they did not want witness' name to appear in it; witness endorsed the check; don't know whether Bulgin told Mr. Dings he was representing witness' father or not; Bulgin signed contract as attorney for witness' father; witness did not come to Ardmore time and again to Dunn & Gillam's office and state to them or one of them he did not get anything out of the business; did not get to handle the money as he thought he would and wanted them to make witness a present; did not come so often that Bob Gillam threatened to kick witness out of his office; and witness is not to get anything out of this litigation; was not to get anything out of the suit pending in the District Court of Carter County; brought that suit to protect the minor alone; witness had not offered to turn back the money he had gotten; witness' answer in this case was prepared and written in Mr. Moore's office this morning; went to Moore's office this morning with Mr. W. A. Ledbetter; answer had already been prepared when he went to the office; Mr. Ledbetter was witness' attorney in guardianship case in the District Court; witness' father had never conveyed land in Carter County, after witness got the loan on land he let his father have the land; made a present of it when he got the loan and witness' father now owns it; witness does not now claim any interest in it and it still belongs to his father; along about the time the first payment became due on one of the notes he told him to go pay it off and he could have it, when Mr. Dunn was over there on August 18; the bonus was not paid until he

and Dunn went to Poteau; it was paid by check delivered to witness; deposited the check to the credit of his ward, gave her credit for it; cashed it that day; could not tell whether he put money in that day or next; it is not a fact that witness cashed check before he went to Poteau; money was put in bank. Witness knows Mrs. Funkhoaser; has not had any communication with her since this transaction occurred; has written to her; witness did not go to see her and say in substance that he wanted to get her to stand in with him and destroy this lease, and if she did do that witness would make it worth while to her or offer to pay her if she would do that; no such conversation occurred; does not remember writing her in his life.

Redirect examination of A. N. Thomas.

He identified two checks given him in connection with the escrow agreement, one for \$1000.00 and one for \$500.00, both dated July 20, 1915, and endorsed on back John J. Thomas, A. N. Thomas; witness endorsed these checks and got the money on them and used it; no part of it was given to his father; Dunn made three trips to Talihina after the controversy growing out of conflict over leases begun; witness stated yesterday answering Mr. Johnson's question he did not know whether his father had conversation with Dunn or not with reference to change of interest in lease, but had conversation on two trips; question of organizing Bull Head Oil Company came up on second trip; had not come up on Dunn's first trip to Talihina; witness had correspondence with Gillam about the mortgage and loan.

J. J. THOMAS, witness for plaintiff, testified as follows:

Lived at Talihina for 32 or 33 years; his occupation is merchant, been engaged in business at Talihina during that time; had been county commissioner once following statehood; appointed county commissioner temporarily then was elected county commissioner up to July; is the father of A. N. Thomas; witness remembers the circumstances of the oil and gas lease being executed by A. N. Thomas as guardian of Allie Daney on August 18, 1913; witness knows Earl McGowan and in a hearsay way knew about their negotiations for a lease on 40 acres of land in the Healdton oil field; heard that negotiations were pending; remembers T. H. Dunn being in Talihina about that time; Dunn had conversation with him about lease; said he was over there for the purpose of obtaining the lease and he came to talk with witness and had quite a bit to say; he thought it would be better to have him (Dunn) secure the lease; that he was in some way responsible

for Senator Gore's position and had helped him wonderfully and they were good friends; financed him and helped him along and necessarily would have some influence in getting these things approved in Washington; Mr. Dunn is setting over there and he will remember it; he went on to state with reference to securing this lease and he would give Atha an interest; by Atha he means A. N. Thomas; he would give A. N. Thomas a one-fourth interest; that is the facts or the main issue of what he was trying to get at; he went on to say it would be better to use my name to save jeopardizing the matter or rather embarrassing it; he suggested that witness' name be used for Atha to carry Atha's interest; they reached an understanding and drew up the contract, setting forth in the usual language; does not think it was a lengthy document however; that he was to hold in escrow or rather hold stock in his name; it was an interest in the lease; a one-fourth interest in the lease; witness never had possession of that contract; witness was not to have any interest in the lease personally, witness saw the contract; Atha had it when he saw it; he kept possession of it at all times; I cautioned him at one time. He was coming over here (to Ardmore). I said that is a very valuable thing to you perhaps, I would be careful about it; I remember this little incident, and to make sure he said he would put it in the bottom of his shoe right under his sock; Mr. Dunn was in and out of witness' place of business for a number of times; does not remember whether Dunn made any suggestion about keeping anything secret or not; witness saw Mr. Dunn after the controversy came up at Muskogee; he was at Talihina three or four times; he and Atha came to the store once and came back to the prescription case; witness had a little office back of the prescription case; Dunn suggested it would make a difference by reason of some other lease or contract on this property and they were changing it in some way; was not positive that Dunn suggested one-fourth interest be reduced. Witness remembers about Dunn holding 2000 shares of stock in the corporation not for witness' benefit but was holding it for Atha; but in witness' name; never did claim any interest in that stock personally and never did get any interest in it; never any negotiations with Dunn or Gillam with reference to the sale of the stock and never did discuss the stock with them in any way; did not know of an escrow agreement which was entered into at Ardmore to which witness' name was signed by Mr. Bulgin until after it was made and they came back home; he heard of the agreement two or three days afterwards; two or three days after July 20 Atha told him about it; did not know the contract was going to be made in witness' name; he knew they were over here (Ardmore), on something touching the business, but as to knowing it was to be made, did not know it;

knew that they were here (Ardmore) for the purpose of negotiation or making some kind of deal, but what it would ultimately be could not know; did not know anything about the deal; witness did not agree that the land should be deeded to him before it was deeded; witness has not seen land yet; did not know anything about the loan being provided for until after the contract was executed; witness rather thinks he knew Bulgin was going to make the trip before he returned; he afterwards found out the land was deeded to him and witness consummated the loan; witness saw the deed a day or two following the agreement; did not know anything about buying this land until after they returned home; \$2000.00 loan was made on the land; witness did not get the \$2000.00 but Atha did; Atha is A. N. Thomas; witness never did see the two checks; plaintiff's Exhibits "9" and "10," being the checks given by Dings, one for \$1000.00 and one for \$500.00 July 20, when the escrow agreement was made, and never did get any money on the checks, not a penny; never heard about the \$1500 being paid in connection with the land transaction until a long time afterwards; just in a circumstantial way it came up and witness heard about it; there was no agreement between witness and Mr. Dunn or Gillam by which witness was to have any interest in the Allie Daney lease executed by A. N. Thomas, guardian, and there was never any agreement by which witness was to have any interest in the stock of the Bull Head Oil Company, and witness did not have any interest in the stock in the Bull Head Oil Company, not a penny. Mr. Dunn on one occasion told witness about the \$2000.00 stock held by Dunn in trust and Atha told him; witness never paid anything for any interest in the stock in the Bull Head Oil Company and never received a dollar of the proceeds of the lease or the stock; witness knows Funkhouser; he did not come with Dunn when arrangement was made about the lease; Dunn made the arrangement with witness and not Funkhouser.

On cross examination of J. J. Thomas.

When Mr. Dunn came into witness' place of business on the 18th of August, Funkhouser did not come with him; Funkhouser had not been dealing with witness; don't recall ever having a single deal with Funkhouser; Funkhouser was not indebted to witness, his wife was; did not talk with Funkhouser on this deal; did not have any conversation with Funkhouser about another minor's lease; did not give him any account; Mr. Dunn was at Talihina on two trips several months following the first trip; witness thinks he discussed with his son the matter of giving Dunn the lease; don't think he went to see him; met up with him in a general way on that day; the question came up about using witness' name

and witness told him to go ahead if it would do him any good; told him he saw nothing wrong about letting Dunn have the lease; Dunn talked with him about his influence in getting the lease and carrying it in witness' name for benefit of Atha; witness don't know anything about Funkhouser making arrangement with witness to get this before Dunn came there; witness didn't know anything about the sale of the stock until after the transaction was consummated; knew he was trying to dispose of it in a general way; supposed that in a general way Bulgin considered he had authorized him to sign witness' name to escrow agreement but had not given him authority directly; had not talked with witness about; did not claim any interest in the stock, and therefore witness did not charge his memory; witness executed the mortgage and thinks he signed application for the loan; read the instrument before he acknowledged it, and warranted in legal form he was the owner of the property; he and his wife acknowledged it; that was just the form that is carried out in these things; it was deeded to him and he had taken the property; it is and going to be his and he is paying it out; did not deed it to his son because he did not think it was worth any more than that; witness paid all except \$1500.00; his son did not care to pay it out; witness is going ahead and pay it out himself; witness gave two mortgages, one for \$500.00 and one for \$1500.00 and two commission notes, one of them is to Mr. Dexter, that is the \$500.00 that has been paid; witness regards statement as to question of fact in making representation to any man just as sacred as he would under oath, and intended to speak the truth when he acknowledged the instrument; witness did not see the land; did not claim any interest in the land at the time he gave the mortgage; Atha was getting the pay for it and put it in witness' name and that is the regular form witness construed it, legally was in possession; and would pay it out and witness intends to pay it out; claimed no interest in property at previous time when testimony was taken at Talihina, but since he is paying the obligations off and Atha did not care to carry them; testified something over a year ago at Talihina; since that time witness paid off one note; has been paying since and now claims the property himself; has paid the taxes this year; the rents of the place do not keep up the taxes nor interest; witness collected rents off the land; had forgotten name of tenant; tenant has been mailing check to witness; does not send it to his son; witness was shown defendants' Exhibit "4" and stated that Atha wrote the letter but witness signed it; witness did not send defendant telegram which is defendants' Exhibit "5;" does not think he was in Fort Smith, Arkansas, at that time; witness did not send telegram which is defendants' Exhibit "6."

Defendants introduced in evidence Exhibit "I" (see p.) which is mortgage in usual form to Wichita Loan & Trust Company, signed by John J. Thomas, his wife, covering 184.67 acres of land situated in Carter County, Oklahoma, also defendants' Exhibit "2," (p.) which is a mortgage covering same land to John R. Dexter; also defendants' Exhibit "3" (p.), which is a letter to Dunn & Gillam, Ardmore, signed by John J. Thomas; also defendants' Exhibit "4" (p.), which is a telegram signed by John J. Thomas; also defendants Exhibit "5" (p.), which is a telegram signed by John J. Thomas; also defendants' Exhibit "6" (p.), which is telegram signed by John J. Thomas.

With reference to all of these telegrams, witness stated: "I did not write any of them that I recall."

Witness had no estimate of value of land and had no occasion to figure any; thought he would on this trip go out and look at it; have not seen it; only was told in passing on the train it was located near the railroad; it is 180 acres I believe; witness owns quite a bit of other real estate and owns a store at Talihina, three store buildings, one big brick store and the merchandise in the store; does not know what he is worth above liabilities; probably twenty-five or thirty thousand dollars, owns about 115 acres of land besides this land.

On redirect examination J. J. Thomas testified:

Mr. Dings executed a warranty deed to this land conveying it to witness and witness mortgaged the title Mr. Dings warranted to him; in a general way witness inferred Gillam induced Mr. Dings to deed him the land; did not know that Gillam executed indemnifying bond to Dings to induce him to deed land to witness.

E. A. McGOWAN, witness on behalf of plaintiff, testified as follows:

Lives at Talihina; don't know hardly what his occupation is; handled real estate and had a farm agency over there; have been living there something over 12 years; has license to practice law and went into more lucrative business; witness knows Allie Daney and made an effort to get a lease on her land; she had forty acres in southwest quarter of section four, township four south, range 3 west in what is now the Healdton oil field; was just interested in this 40 acres; it is the land covered by the lease to Dunn and Gillam; witness saw Dunn in Talihina on or about August 18, 1913; just about

that time or prior to that time witness made an effort to get a lease on this land; there had been several fellows there trying to secure the lease; and witness heard about a well coming in in section nine which was a mile or so away from it and it looked as if the land might be valuable, and went to Thomas and told him as he was going to give this lease to somebody and he might as well let witness have it; witness would pay as much bonus as the rest, and if the lease became valuable would split what witness made out of it with Thomas; and he, A. N. Thomas, agreed to it, and witness had to have a departmental lease and phoned to Poteau or Muskogee and got form of lease same day Dunn came to Talihina; that Dunn came in on short train, might have come in on the night train, did not see him until 9:30; blank lease came to witness from Muskogee and witness went and told Thomas his lease had come, and could tell he had become very much interested in the proposition and would not let witness have the lease; had seen Dunn in the meantime; Thomas told witness he was just a young fellow and did not have much money nor reputation, and it took a man of considerable money or influence to get some of these oil leases approved; witness told Thomas he did not have much of either but figured on having some some day and if Thomas did not figure that witness could get the lease through, he could go to "hell with it" or to that effect and give Dunn his lease and maybe wish later he had given it to witness; witness was pretty sore; witness saw Dunn on that day milling around all day back and forth across the street; don't think he talked to Dunn personally; talked to Funkhouser, he was a lawyer there in town; believed he had conversation with him right away after witness' blank lease came in on noon train; believed he had been talking to Funkhouser before that time, because when he went home to lunch D. Thomas talked to witness about the lease and Mr. Funkhouser had been talking to witness before about it; witness married D. Thomas' daughter; saw Funkhouser later in the day; Funkhouser told witness that the three of them, D. Thomas, Funkhouser and witness, could get a one-fourth interest in the lease if witness would get out of the way; witness had oral agreement with Thomas for the lease; Funkhouser, D. Thomas and witness were to have one-fourth interest in the lease, that was the proposal Funkhouser made to witness, and agreement in writing to that effect was made; Funkhouser along late in the afternoon about dusk brought a contract he had written, he always wrote a contract on double foolscap paper and had written it with a lead pencil, brought it to witness and asked witness to write it on the typewriter and make three carbon copies of it so there would be one for each of them; witness did this and gave a copy to Lee Thomas,

witness' brother-in-law; witness was shown copy of contract which is attached to witness' answer, and to the bill of complaint, same being the plaintiff's Exhibit "2," and stated as he remembered it, it was an exact copy; witness kept that contract until Dunn and Gillam sued him and in the settlement with them witness let them have the contract; that was when Funkhouser, Dunn and Gillam altogether sued him; witness kept the contract up to that time; witness knew about the conflict about leases before the office in Muskogee; didn't know whether Mr. Dunn was at Talihina while that controversy was on or not, he saw Dunn before Dunn said Bull Head Oil Company was organized; had conversation with him about change of witness' interest in the lease, that is about stock ownership; the conversation with Dunn was in D. Thomas' office and he was talking to D. Thomas and witness thinks Leo Thomas was present, could not say; Dunn said a man by the name of Eaves was curator of Allie Daney and the Mullin interests had secured a lease from Eaves, and on account of the two leases, they were going to split it, and that would cut their interest, instead of one-fourth, to organize this and call it the Bull Head Oil Company and the reason they were naming it that was on account of the fellows being bull-headed, so many in the deal and were going to put this land in, and five acres of the Gladney, making forty-five acres, going to turn this into a corporation for four hundred dollars an acre, he said that would be a reasonable amount and no watered stock * * * he said one-half of the stock was to be issued to the Mullins interest and one-half to him as trustee; he stated \$1000 of the Mullins stock was to go to Gladney and \$1000 of his stock to go to Dolman, attorney's fee representing the company; * * * he said the reason Dunn said he wanted to hold this stock as trustee was because he, Dunn, was afraid of the Mullins gang; Dunn said "If I could hold my stock altogether, I can hold them down, if I issue you fellows the stock, the Mullins fellows will buy you and then will out vote us and that will ruin us, and I will hold it all for us." Witness gave up 200 shares of his stock in getting stock issued, and the case settled, 666 shares of stock was issued to witness straight; witness bought enough additional stock to make up 800 shares; witness sold stock to Jake Hamon some two or three years ago; witness did not render any legal services for Dunn & Gillam in connection with lease nor any other services; D. Thomas rendered no services for lease; witness had to abandon his effort to get lease, did not pay anything for interest in the lease nor for original stock, paid an assessment of \$66.00; stock sold to Jake Hamon was not paid for at all by witness. Witness sold all his stock to Jake Hamon two or three years before for \$3900.00.

Q. Now, Mr. McGowan, in the contract between T. H. Dunn and J. Robert Gillam, dated August 18, 1913, and yourself, D. Thomas and Funkhouser, it recites: "This agreement made and entered into on this 18th day of August, 1913, by and between T. H. Dunn and J. Robert Gillam, parties of the first part, and D. Thomas and A. N. Funkhouser and E. A. McGowan, parties of the second part, witnesseth: For and in consideration of the legal and other services rendered by said parties of the second part (that is yourself, Funkhouser and D. Thomas) for said parties of the first part in assisting and securing for said parties of the first part a lease contract on the following described real estate, for mineral, oil and gas purposes, said parties of the first part agree and bind themselves jointly and severally to keep and hold for the sole and exclusive benefit of the said parties of the second part one full fourth interest in and to the said above described lease." Did you render any legal services for Mr. Dunn and Gillam?

A. I drew up the contract that Funkhouser brought to me.

Q. You copied the contract Funkhouser brought to you?

A. Yes, sir.

Q. Did you render any other legal services?

A. No, sir.

Q. Do you recall D. Thomas rendering any legal services?

A. He was not a lawyer.

Q. What was he?

A. Merchant.

Q. Do you know of any other services he rendered?

A. Mr. D. Thomas?

Q. Yes.

A. No, sir.

Q. Did you render any other service?

A. No, sir.

Q. Did you abandon any effort to get the lease?

A. Well, I had to. I did for two or three reasons.

Q. Did you pay anything in any way for the interest conveyed to you in that contract in the Allie Daney lease?

A. No, sir, not for the original stock.

On cross examination E. A. McGowan testified:

Had been figuring with A. N. Thomas some days about getting the lease; witness told Thomas he would give him one-half of what he made out of the lease; did not have any talk with Mr. Dunn on that day, just saw him on the street; Mr. Dunn was spending so much time running back between the two stores he could have dropped in any time in the day and just missed him; later in the day the proposition was made to witness by Funkhouser that the three would divide the one-

fourth interest; witness was not to give his services in seeing the lease approved; guess he would if called upon; witness went to Muskogee when the controversy came up to protect himself; witness did not tell Mr. Kelsey he had an interest; would have been a "durn fool" if he had told him he had an interest, certainly did not tell him; thinks Thomas was there, did not see the instrument that Dolman had; heard what Kelsey had to say to the gang; Kelsey said to the crowd: "I have a certified check here for twenty thousand; you have got to get together and if you don't get together, I am not going to approve either lease, I will throw it open and let it bring what it will." He doesn't know what the curator did; on the day the Allie Daney lease was granted witness got a lease on Helen Bryant's land; got it from Raymond Bryant, her guardian; Mr. Funkhouser was not to have an interest in that; he brought suit against witness because Dunn & Gillam wanted to beat witness out of stock in Bull Head Oil Company; that is witness' conclusion; did not settle with Funkhouser, did not give him anything; witness was shown letter and asked to explain it and said it refers to \$2500.00 paid to Errett Dunlap for Mr. Funkhouser, for his interest in the company; did not have a compromise settlement with Funkhouser; witness and Dunlap had the understanding that the settlement for Funkhouser's interest was to be kept quiet and not to be told to Dunn and Gillam; witness did not understand that Dunn and Gillam were to furnish the money to develop the lease; witness intended to put money into it; stock was not to be held in trust to secure Dunn and Gillam for money they advanced; witness paid his assessment when called on for it; does not know whether his father-in-law paid or not and did not know whether Mr. A. N. Thomas and J. J. Thomas paid assessments or not; there was not any talk about the property or interest being held until Dunn and Gillam were secured for anything advanced; Funkhouser just stated all of us would get a one-fourth interest; Funkhouser was not to get any interest in the Helen Bryant lease; leases were selling there about that time about one dollar an acre, something like that; when corporation was organized witness was entitled to 666 2/3 shares of stock; D. Thomas was entitled to the same amount; D. Thomas' stock was purchased through Errett Dunlap; witness got part of it, enough to make 800 shares, and that was the 800 shares witness sold Jake Hamon; witness paid nothing for developing the property except assessment of \$66.00; witness owns considerable land, about 3500 acres; it is not covered by mortgage.

On redirect examination of E. A. McGowan, he testified:

Kelsey said he had a check for ten or twenty thousand dollars bonus for that lease, and unless they got together he

was going to refuse to approve the lease at all and open it up for competition.

LEO M. THOMAS, witness for plaintiff, testified as follows:

Has lived at Talihina all his life; twenty-nine years old; son of D. Thomas; remembers occasion of negotiations with A. N. Thomas, guardian of Allie Daney for oil and gas lease about August 18, 1913; saw Dunn there at that time; was present when Dunn and witness' father had conversation with reference to lease; heard Dunn make statement first time he was there that if they would assist in getting the lease he would give witness' father and McGowan and Funkhouser one-fourth interest; Mr. McGowan was not present at the time; Funkhouser gave as reason why Mr. Dunn rather than Mr. McGowan should have the lease that Dunn had lived at Lawton and was very close to Senator Gore, and if Mr. Dunn could get the lease, as soon as it was forwarded to Washington, Mr. Gore would step over to the Secretary and just have it approved and would come right back; a written contract was prepared with reference to the interest that D. Thomas, Funkhouser and McGowan were to have in the land; on the same day a written contract was prepared and signed with reference to the interest of J. J. Thomas; doesn't know who prepared it, but witness saw the contract; knows its contents; the only difference witness could see in the contract of the interest of J. J. Thomas and D. Thomas and Funkhouser and McGowan was his legal services in one; that was not in the J. J. Thomas contract; J. J. Thomas' contract was for one-fourth; he was to have the same interest as the other three in the lease; witness was not present when the negotiations were made that led up to the J. J. Thomas contract; saw it afterwards; the last time witness saw it as well as he could remember was in the Whittington Hotel, Ardmore; the first time he saw it was in A. N. Thomas' store at Talihina; it was about two or three months after August 18, A. N. Thomas had it.

On cross examination Leo M. Thomas testified:

Witness was in Talihina on August 18, the day the lease was executed; was working for his father; Funkhouser came to see witness' father and said Dunn and Gillam would give the three an interest if they would assist in getting the lease; as well as witness can remember that was in the morning, would not be positive; witness could not say his father went to see A. N. Thomas or anybody; did not go so far as witness knows; does not know what time of day the lease was granted

by A. N. Thomas to Mr. Dunn; witness saw the lease in his father's office or in A. N. Thomas' store; saw it after it was executed, drawn up and filled out; Thomas had signed it as guardian; did not see any money paid him; witness saw the lease after the contract for the interest of his father, Funkhouser and McGowan was drawn; witness' father and Mr. Dunn had signed the contract when he saw it; witness thinks he carried it to Funkhouser for his signature; Funkhouser contract must have been signed later in the evening; witness saw J. J. Thomas contract; T. H. Dunn signed it; J. J. Thomas' name was not on it, signed by Dunn & Gillam, by T. H. Dunn; saw J. J. Thomas contract two places, one time at Whittington Hotel; Atha Thomas had it, got it out of safe; don't know whether his father signed contract or not; witness carried contract to Funkhouser; don't know whether or not he said the contract had been signed by his father, and Dunn, when he took it there; believe he got it at McGowan's office and carried it to Funkhouser; did not see anybody's name on the contract; saw the contract after it was signed; think Mr. Dunn, D. Thomas and Funkhouser and A. E. McGowan signed it, all of them; that was after it had been finished; that was after the lease was signed up; don't think it was the same day; when witness' father sold his interest, he thinks they took this contract up, that was his memory; at the time D. Thomas sold, he thought he was selling it to the Mullins' interest, but I think Mr. Dunlap bought it; he thought he was selling it to the Mullins' interest because Mr. Dunlap was interested.

R. G. BULGIN, witness for plaintiff, testified as follows:

Lives at Poteau, Oklahoma; occupation, lawyer; lived there about ten years; one of the attorneys in this case; was attorney for A. N. Thomas in the suit brought by him for Thomas as guardian of Allie Daney in the District Court of Carter County, against same defendants as here; has known A. N. Thomas ten years; did not know about the Allie Daney lease until after it was executed; his partner is T. B. Lunsford; remembers the occasion of Mr. Lunsford coming to Ardmore in July, 1915; after Lunsford came to Ardmore, witness came to Ardmore with A. N. Thomas; did not talk to J. J. Thomas before coming to Ardmore; never had any conversation with A. N. Thomas before coming to Ardmore about lease; came on his request over the telephone; on the way over to Ardmore A. N. Thomas showed witness contract or agreement signed by T. H. Dunn or Dunn and Gillam; remembers the purport of contract; does not remember it word for word; it was signed by Dunn and Gillam by T. H. Dunn; does not

remember date; it was in favor of J. J. Thomas, and the substance of it was he had assigned a one-fourth interest in the Allie Daney lease to J. J. Thomas; saw Mr. Gillam next day at his office; was present and heard part of conversation between Gillam and A. N. Thomas as with reference to certain stock held in the Bull Head Oil Company; Atha was trying to make a sale of his interest to Mr. Gillam; no price was mentioned in witness' presence; Atha was trying to get an offer, and no offer was made in witness' presence; Gillam wanted to know what he would take for it and I remember him saying it was not worth much at that time because oil had gone off and was very cheap, was not much demand for it; A. N. Thomas and Mr. Gillam in the afternoon drove out to look at some land that was to be taken in on the trade or sale of this interest in the lease or stock in the corporation; at that time A. N. Thomas was claiming interest in corporation; heard discussion between Gillam and Thomas when they came back from looking at the land; they stated to witness what they had agreed on, that Thomas was to take this tract of land and \$1500.00 in cash and Mr. Gillam was to secure loan on the land for \$2000.00 and there was to be a deed made and the money turned over for the interest; witness drew up escrow contract, same being plaintiff's Exhibit "6"; it was stated by Mr. Gillam that Mr. Dunn was out of town and that they had agreed before Mr. Dunn left to convey the land to Mr. Dings as trustee so if Mr. Gillam made any trade with reference to the land it could be conveyed at once without being sent to Mr. Dunn for his signature; Gillam did not explain why Dunn did not convey the land to him instead of to a stranger; Gillam paid the \$1500.00; the assignment of J. J. Thomas' interest in stock was not prepared there; did not see the assignment until day before yesterday; does not know who prepared assignment; witness' recollection is that the assignment was to be sent over from Talihina and attached to this agreement.

On cross examination R. G. Bulgin testified:

Witness drew escrow agreement by which they provided assignment should be attached as an exhibit, it was not attached at the time; was authorized to sign J. J. Thomas' name; A. N. Thomas stated to witness that his father told him that if it was necessary to execute any instrument to let witness sign his name, acting on that and on one other circumstance, witness signed J. J. Thomas' name; at the time the agreement was drawn up, A. N. Thomas asked me, or Mr. Gillam, I think Mr. Thomas, to sign his father's name. "I think Mr. Thomas made the request and I said to Gillam, the only authority I have to sign Mr. Thomas' name is the statement

of A. N. Thomas, and with that understanding and with the understanding of the conversation they had there between Gillam and Thomas that the interest belonged to A. N. Thomas individually, I was allowed to." Witness made this statement to Gillam and Thomas.

A. J. HOUGH, witness for plaintiff, on direct examination stated:

That he is an employee in the office of the Superintendent, Mr. Parker at Muskogee, and has to do with the royalty funds from oil and gas leases, that he had with him on the stand original records touching the oil and gas lease on 40 acres of the Allie Daney land in this suit. Witness states to court total amount of oil received from that lease since its approval by the Secretary of the Interior was \$510,000.00 and the royalties \$72,515.00, and that the royalties were obtained under the Dunn and Gillam lease with A. N. Thomas guardian of Allie Daney; all the royalties were paid by the Bull Head Oil Company except the advance royalty; as an employee of the Indian Superintendent the only dealings I had with "the matter in connection with the J. J. Eaves curatorship or lease" was "that preparatory to the conferences which eliminated that lease."

Counsel for plaintiff here offered stipulation signed by all counsel in the case consenting to the introduction in this case of the deposition of Dana H. Kelsey, Superintendent of the Five Civilized Tribes, taken in the case of A. N. Thomas, guardian of Allie Daney, plaintiff, v. Bull Head Oil Company, et al., defendants, heretofore pending in the District Court of Carter County, Oklahoma. Said deposition having been taken on behalf of the defendants in the State Court.

Thereupon, the plaintiff offered in evidence a cross examination of DANA H. KELSEY as contained in said deposition wherein the said Dana H. Kelsey testified as follows:

He was only interested in having one of the guardians out of the way and proper guardian appointed for the minor; it was absolutely immaterial to him which one got out of the way or which one held the custody of the property; the lease executed by Eaves to Mullin contained in addition to the small tract in the heart of the Healdton field, some other land, that land was to be eliminated from the Mullin lease; Mullin asked that the lease be disapproved as to this forty acres involved, but he didn't ask that he disapprove the remaining lease on some ninety acres, but the lease was kept in his office at Muskogee

allowing Mullin a short time to take that lease to the LeFlore County Court to get Thomas to join as to the other part of this land; at the time the A. N. Thomas lease was presented to witness, he did not know there was an agreement between Dunn and Gillam, that A. N. Thomas, guardian, was to have undivided one-fourth interest in the lease, and never heard of it; if that fact had been disclosed to witness, he would not have recommended the approval of the lease; I don't think I would; certainly would not have approved the lease if I had known there was an agreement between Dunn and Gillam to give A. N. Thomas, personally and individually an interest in the lease; certainly would have rejected the lease and would not have recommended it for approval if I had known that J. J. Thomas, father of A. N. Thomas, had an agreement with the lessees by which he was personally and individually to be the beneficiary to the extent of an undivided one-fourth interest in the lease; and if he had known that D. Thomas, the uncle of the guardian who lived in the same town with him, had an agreement by which he was to have an interest amounting to one-twelfth interest in the lease for which he paid no consideration except his influence and effort in inducing the guardian to sign the lease, witness would have rejected the lease; witness would not have approved the assignment of the lease to the Bull Head Oil Company if he had known there was an agreement between Mr. Dunn and J. Robert Gillam that the guardian A. N. Thomas was to have an interest in the stock of the Bull Head Oil Company amounting to one-fourth of the capital stock of that company, nor would he have recommended the approval of the assignment if he had known that there was an agreement between Dunn and his partner Mr. Gillam on one side and the guardian, A. N. Thomas, that the father of A. N. Thomas, whose name is J. J. Thomas, was to have an interest in the company amounting to approximately one-fourth of the capital stock of the Bull Head Oil Company; and he would not have recommended the approval of the lease if he had known at the time the Bull Head Oil Company was organized and prior thereto, it was the agreement between Dunn, representing his partner, J. Robert Gillam, that a certain interest in the stock of the Bull Head Oil Company was to be issued to T. H. Dunn as trustee, to be held for the personal benefit of J. J. Thomas, the father of the guardian, or for the guardian himself or for the guardian's uncle, D. Thomas.

Stipulation of Counsel.

It is conceded by the defendants that after the compromise agreement under which the Bull Head Oil Company was organized and the lease from Thomas, guardian, to Dunn and

Gillam was signed by Eaves, curator, Mullin requested that the lease executed by Eaves, curator, to him (Mullen, and shown by Plaintiff's Exhibit 23) be disapproved, and that it was disapproved so far as the land in controversy is concerned, and that therefore Eaves as curator had nothing further to do with the oil and gas lease or the royalties collected therefrom, and that from and after the approval of the lease executed by A. N. Thomas, as guardian, and Eaves as curator, Thomas has been recognized as the guardian of Allie Daney in all matters connected with the operation of the lease.

Plaintiff here introduced in evidence plaintiff's Exhibit "14" being the enrollment record of Allie Daney, showing the minor to be sixteen years of age at the time of the trial, and it is admitted that the minor Allie Daney is a full-blood Choctaw Indian.

Plaintiff here introduced plaintiff's Exhibit "15" being certified copy of report of Dana H. Kelsey as United States Indian Agent to the Commissioner of the Indian Affairs, recommending the approval of the Atha N. Thomas lease. Which report is as follows:

Union Agency

Muskogee, Okla., Jan. 31-1914.

The Honorable,

Commissioner of Indian Affairs.

Sir: There is respectfully submitted herewith an oil and gas mining lease covering certain land in the Chickasaw Nation, executed as follows, in favor of T. H. Dunn and J. Robert Gillam:

No. 27965, Allie Daney, minor full-blood Choctaw, lessor, by A. N. Thomas, Gdn., lessor, joined in by J. J. Eaves, holding letters of curatorship. No removal of restrictions. Royalty 12½ per cent. Bond \$1000, Southern Surety Company, Surety. Lease dated 8-19-13, filed 8-22-13. \$70.00 bonus paid lessor. \$2000.00 bonus to be paid out of oil run, as per attached stipulation. \$6.00 Adv. Royalty credited 8-22-13.

The records of the office show that this is the first lease filed by these lessees as copartners, and although both have other Department lease holdings it does not appear that either is in any manner interested in more than the maximum acreage. On Form B they state that they have combined resources amounting to \$100,000 with at least \$5000 available for development of this lease. Neither of these lessees is shown

to be interested with any firm or corporation doing an inter-state pipe line business in Oklahoma, and both the lessees and the surety on their bond are in good standing with the Department.

There was filed with the above lease copy of letters of guardianship issued to Atha N. Thomas as guardian of Allie Daney, a minor by the County Court of LeFlore County, Oklahoma, dated July 24, 1911, and order of said County Court confirming this contract of lease in favor of Dunn and Gillam.

On August 23, 1913, there was filed with this office lease executed by J. J. Eaves, Curator of Allie Daney, a minor, in favor of J. S. Mullen, dated August 18, 1913. Accompanying this lease were letters of curatorship issued to J. J. Eaves by the United States Court for the Southern District of Indian Territory, dated November 8, 1905, and an order of the County Court of Love County, Oklahoma, to which county this curatorship case was transferred after statehood confirming the contract of lease to J. S. Mullen. This lease described all of the land embraced in the lease executed in favor of Dunn and Gillam, as well as other lands allotted to this lessor.

The respective lessees were notified that their leases conflicted and each responded with a brief protesting against the approval of the other lease. The arguments presented on both sides were to the effect that the guardian or curator who executed the other lease was not the legal guardian or curator and therefore had no authority to lease the land in conflict.

On August 19, 1913, this office received a telegram from Jake L. Hamon, asking that action be withheld on lease covering the Allie Daney land, executed in favor of T. H. Dunn and there was filed on behalf of Mr. Hamon on August 28, 1913, a certified copy of a notice of appeal directed to the County Court of LeFlore County, appealing from the order of said court approving lease executed by Atha N. Thomas to Dunn and Gillam. The grounds of this appeal were to the effect that the authorized agent of Mr. Hamon had made an offer to Atha N. Thomas for the lease; that he stood ready to meet all competition that might arise and had requested the guardian to notify him when he was ready to lease so that he might have an opportunity to bid when the matter was referred to the court for approval. He further stated that he received no such notice, hence the appeal.

In view of the fact that the lease to Dunn and Gillam was approved by the County Court of LeFlore County, and that Mr. Hamon has no lease covering the lands in controversy, and in view of the further fact that Judge Brown of the District Court has personally informed me that he did not

entertain but has dismissed this appeal, I respectfully recommend that the protest of Mr. Hamon be dismissed.

The conflict over the matter of guardianship arising, it was thought necessary to hold a hearing, which was accordingly done, at Muskogee, Oklahoma, on December 13, 1913, and the briefs above referred to, together with copy of the testimony taken at this hearing, are transmitted herewith.

The facts in the case present only one question for consideration; which was the legally appointed guardian entitled to act for Allie Daney at the time the leases were executed? It appears that this office would not have been warranted in making a favorable recommendation on either of the leases until the court had determined which was the legal guardian or curator. It appears, also, that there was filed in the County Court of Love County a petition for the removal of the matter of the guardianship or curatorship of Allie Daney, a minor, to the County Court of LeFlore County, Oklahoma, where the minor has always resided, in order to finally determine the matter of guardianship. This action was resisted by J. J. Eaves, curator, who desired to have the case transferred to Carter County, Oklahoma. This cause came on for hearing on October 13, 1913, and by order of the court was transferred to LeFlore County, from which decision an appeal was immediately taken.

From the attitude of the parties concerning the matter of guardianship it appeared that endless litigation was at hand, and consequently the leases might be held up indefinitely awaiting final action by the courts.

With the interests of the minor in view, I communicated with the lessees of the conflicting leases with the object of holding conference with them or their attorneys to the end that arrangements might be made for protecting their interests as well as those of the minor lessor.

At the conference subsequently held, a compromise was effected, wherein J. S. Mullen, lessee in the prior lease, requests the Department to disapprove his lease in so far as it covers the land described in the lease to Dunn & Gillam. J. J. Eaves, as curator of Allie Daney, has entered into the execution of the lease in favor of Dunn & Gillam, to which the County Court of LeFlore County has given its approval.

It is further agreed between the parties that they shall organize an oil company, the sole stockholders in which are to be the parties lessee in these two leases. To this company Dunn & Gillam have agreed to assign their lease in full. As it will take some time to have the assignment papers executed it is thought advisable to transmit the lease with recommenda-

tion for approval at once. Upon return of the parts, if the lease is approved, same will be held in this office pending the filing of the proposed assignment thereon.

On January 24, 1914, the United States Oil Inspector reported that the bonus of \$70.00 paid by Dunn & Gillam was inadequate, and advised that it is to the best interests of the minor that in lieu of an additional cash bonus to be paid at this time, the lessees be required to pay a further bonus of \$2000.00, to be taken out of the proceeds of the sale of the first oil produced, and to be paid in monthly installments at the rate of 25% of the gross monthly runs exclusive of royalty interests of 12½ per cent recited in the lease.

Messrs. Dunn & Gillam have entered into a stipulation in which they have agreed to pay the bonus consideration precisely as above recommended, and this stipulation has been made a part of the lease. Special bond of \$2000, with the Southern Surety Company as surety, guaranteeing the performance of the obligations assumed in this stipulation has been prepared and forwarded to Ardmore, Oklahoma, for the signature of the lessees.

From the report of Field Clerk Mills, dated December 11, 1913, and other reports received at this office, it is known that developments have already reached the lands owned by Allie Daney, and activities there admit of no doubt that the lands of this minor are in great danger of being drained of oil, there being already two wells in operation, wells to off-set which should be drilled at once.

In view of the facts set out above it is respectfully recommended that this lease be immediately approved to extend to November 16, 1921, during minority of lessor, and as much longer thereafter as oil or gas is found in paying quantities, together with accompanying bond, and that the office be advised by wire in order that the lessees may begin drilling operations without further delay.

Respectfully,

Dana H. Kelsey,
United States Indian Superintendent.

The Mullens lease, which he asks to be disapproved, in so far as the enclosed lease is concerned, also covers considerable land in another location, which is not being drained, and which lease is not yet ready for submission, but will be forwarded later, as soon as steps can be taken in due course of procedure to have one of the guardians discharged and the other held to be the only legal guardian. The lessees adjoining the forty acres in question have just commenced to take much oil within the last few days, which will begin to drain

this forty acres. Therefore, early action is necessary. Messrs. Dunn & Gillam are ready to move in a drilling outfit immediately.

D. H. K.

Plaintiff next introduced plaintiff's Exhibit "16," being certified copy of verified application of Dunn & Gillam for approval of the A. N. Thomas lease. Which application reads as follows:

"To the Secretary of the Interior:

T. H. Dunn and J. Robt. Gillam of Ardmore, Oklahoma, hereinafter designated as the applicant, hereby applies to have approved the accompanying lease embracing 40 acres of land allotted to Allie Daney, of Talihina, Oklahoma, a citizen of the Choctaw Nation, and agrees that this application shall be considered a part of the lease so described.

The applicant solemnly swears that the lease, for which approval is requested, is taken in good faith in the interest and for the exclusive benefit of the applicant, and not for speculation or transfer, or as agent for, or in the interest or for the benefit of any other person, corporation or association; that no other person, corporation, or association, has any interest, present or prospective, directly or indirectly, therein, and that there is no understanding or agreement, expressed or implied, by which the land leased, or any interest in or under the lease by working or drilling contract or otherwise, is to be used, sublet, assigned, or transferred, without the consent of the Secretary of the Interior, first obtained, but that it is taken for the purpose of operation and development under the direction, supervision and control of the applicant, except as herein stated.

In addition to the leases in the name of the applicant for which approval is requested, the affiant solemnly swears that the applicant is not interested, either directly or indirectly, in oil or gas mining leases or lands in the Five Civilized Tribes, except with the following named persons, corporations, or associations, and that the aggregate of all these interests, together with the leases held by the applicant alone, is not more than 4,800 acres:

Name of persons, corporation, or association with whom applicant is interested: None. Postoffice Address.

The applicant hereby states that his general business experience for the past five years has been as follows: Investments in lands and oil development.

The applicant's financial condition as this time is good.

It is further stated that the applicant's resources are as follows: Lands and city property valued at \$100,000.00 and that he has available at least \$5,000.00 for the development of the land covered by said lease.

Where the applicant is a corporation, it hereby shows that at this time it has \$..... paid up capital and \$..... in its treasury available for oil and gas operations.

It is hereby agreed that on the issue, transfer, or cancellation of stock of corporations, or changes in officers, prompt reports will be made thereof as required by the regulations.

The books and accounts of the applicant covering the business to be carried on under this lease, if approved, will be kept at Ardmore, Oklahoma, in the custody of the applicant.

The applicant agrees that the money deposited with the United States Indian Superintendent as the first year's advance royalty under said lease shall be and become the property of the lessor if the lease be disapproved because of the lessee's failure to meet the requirements of the law or the regulations of the Department of the Interior applicable thereto or because of any other fault or defect chargeable to the lessee.

References: First National Bank, P. O. Ardmore, Okla. Guaranty State Bank, P. O. Ardmore, Okla.

Executed this 20th day of August, 1913, at Muskogee, Okla.

T. H. Dunn,

J. Robert Gillam.

Before me, a notary public in and for the County of Carter, State of Oklahoma, personally appeared T. H. Dunn and J. Robert Gillam, who, being first duly sworn according to law, depose and say that the foregoing application was signed by the proper authority and in good faith for the purpose therein stated, and that the statements made therein are true as they verily believe.

Frank S. Wolverton,
Notary Public.

(L. S.) My Commission expires March 18th, 1914."

Plaintiff next introduced plaintiff's Exhibit "17," being a stipulation of the Bull Head Oil Company as to the additional \$2000.00 royalty to be paid in oil, and is in words and figures, as follows, to-wit:

"Know All Men by These Presents:

That, whereas, T. H. Dunn and J. Robert Gillam, as principals, entered into a certain indenture of lease dated Au-

gust 19, 1913, with A. N. Thomas, guardian of Allie Daney, a minor, for the lease of a tract of land described as follows:

The West Half (W $\frac{1}{2}$) of the Southwest Quarter (SW $\frac{1}{4}$) of the Southwest Quarter (SW $\frac{1}{4}$), and the South Half of the Northwest Quarter (NW $\frac{1}{4}$) of the Southwest Quarter (SW $\frac{1}{4}$) of Section Four (4), Township Four (4) South, Range Three (3) West.

located in the Chickasaw Nation, Oklahoma, for oil and gas mining purposes, for a period of ten years from the date of approval herero, and as much longer thereafter as oil or gas is found in paying quantities on said land, and

Whereas, the lessees on January 21, 1914, entered into a stipulation wherein they agreed that there shall be paid to the guardian of the said Allie Daney, or to the Department, as the Department may require, the sum of Two Thousand (\$2000.00) Dollars in addition to the amount theretofore paid for the benefit of said minor, which Two Thousand (\$2,000.00) Dollars shall be paid as follows: Said Allie Daney, in addition to the one-eighth ($\frac{1}{8}$) royalty called for in said lease hereinabove mentioned, shall receive twenty-five per cent (25%) of the proceeds of all oil, exclusive of the twelve and one-half per cent (12 $\frac{1}{2}$ %) royalty until the sum of Two Thousand (\$2,000.00) Dollars in cash shall have been paid to the proper person or persons for the use of the said Allie Daney; and,

Whereas, on January 28, 1914, the said T. H. Dunn and J. Robert Gillam did transfer and assign said lease to the Bull Head Oil Company;

Now, therefore, by the proper officers of the said Bull Head Oil Company, the assignee hereby accepts the conditions contained in the original stipulation as above set out, and agrees to fulfill such part of the stipulation contract as may remain unfulfilled at the time of the approval of the assignment by the Honorable Secretary of the Interior.

Bull Head Oil Co.
By E. Dunlap, Pt.

Attest: T. H. Dunn, Sec. (Seal)

The Southern Surety Company, surety on the bond of T. H. Dunn and J. Robert Gillam, dated February 29, 1914, covering the above described stipulation, consents to the transfer of the obligations therein to the Bull Head Oil Company, and agrees that the bond shall remain in full force and effect.

Dated, this 2nd day of March, 1914.

Southern Surety Company,
By H. H. Wood, Its Attorney in Fact."

Plaintiff next introduced plaintiff's Exhibit "18," being certified copy of bonus affidavit made by A. N. Thomas, guardian, and affidavit of J. Robert Gillam, which are as follows:

State of Oklahoma, County of LeFlore—ss:

I, A. N. Thomas, of Talihina, Okla., being first duly sworn according to law, state upon oath that I am more than 30 years of age, and that under date of Aug. 19th, 1913, I made an Oil and Gas Mining Lease with T. H. Dunn and J. Robert Gillam, covering 40 acres; that said lease was read over carefully and explained to me at the time I signed same, and I understand the nature, contents, and effect thereof; that I made said lease in good faith for the purposes therein specified, and now join in the application of the lessee for its approval by the Secretary of the Interior.

I further swear that other than the terms of the lease described, the only contract, agreement, or understanding between myself and the lessee covering additional payments made or to be made as bonus money, or any other consideration, is as follows:

Seventy dollars (\$70.00) as bonus, of which amount I acknowledge the receipt of \$70.00, the balance, if any, payable and the following additional agreement:

I further state that I have satisfied myself as to the value of this lease, and believe that the amount of bonus offered me as above indicated was reasonable and proper at the date the lease was executed.

A. N. Thomas,
Legal Guardian of Allie Daney.

Witnesses to Mark: C. C. Wood, P. O. Ardmore, Okla.
. P. O.

(Where lessor does not speak English interpreter must sign and be sworn to correctness of interpretation.)

.....
(Signature of Interpreter.)

Subscribed in my presence and sworn to before me this 19th day of Aug. 1913. In connection therewith I certify that the above affidavit was fully explained to the Indian lessor, and I am satisfied said lessor fully understands the nature of the lease referred to.

P. C. Bolger, County Judge,
LeFlore County, Oklahoma.

(a) Affidavit of Indian lessor should be sworn to before a United States Commissioner, Indian Superintendent, Local Representative Union Agency, County or District Judge, Federal Judge or Clerk of Federal Court.

Where leases are executed by guardians under order of court, affidavit of lessor may be executed before a notary public.

(Over for Affidavit of Lessee.)

Affidavit of Lessee.

I, J. Robert Gillam, of Ardmore, Oklahoma, being first duly sworn according to law, state upon oath that I am the lessee or the duly authorized agent of the lessee in the above described lease; that I know of my own personal knowledge that the only bonus to be paid for the execution of said lease, directly or indirectly, by the lessee to the lessor or any one for him is \$70.00 of which \$70.00 has been paid, and \$..... payable, and that the other agreement is precisely as stated by the lessor above; that there have been no operations or drilling for oil or gas by the lessee or any one for him upon the said premises included in said described lease: And that said lease will be completed under the rules of the Secretary of the Interior without unnecessary delay.

J. Robt. Gillam.

Subscribed and sworn to before me this 22nd day of August, 1913. J. A. Walkup, Notary Public. (Seal) My commission expires May 13, 1917.

Plaintiff here offered in evidence its Exhibit "19" being an assignment of the oil and gas lease in controversy from T. H. Dunn and J. Robert Gillam, to the Bull Head Oil Company, which assignment is in words and figures as follows, to-wit:

"Whereas, the Secretary of the Interior has heretofore approved an oil and gas mining lease, dated August 19, 1913, entered into by and between T. H. Dunn and J. Robt. Gillam, lessee, and A. N. Thomas, Guardian, and J. J. Eaves, Curator of Allie Daney, lessor, covering the following described lands in the Chickasaw Nation, Oklahoma:

The S/2 of NW/4 of SW/4; and W/2 of SW/4 of SW/4 of Section 4, Township 4 South, Range 3 west.

Now, therefore, for and in consideration of Eight Thousand (\$8,000.00) dollars, the receipt of which is hereby acknowledged, the said T. H. Dunn and J. Robert Gillam, the lessees in the above described lease, hereby bargains, sells, transfers, assigns, and conveys all their right, title, and interest of the lessee in and to said lease, subject to the approval of the Secretary of the Interior to Bull Head Oil Company, of Said assignment to be effective from date of approval hereof by the Secretary of the Interior.

In witness whereof, the said lessee has hereunto set their hand and seal, this 28 day of January, 1914.

T. H. Dunn.

J. Robert Gillam."

The acceptance of said assignment by the Bull Head Oil Company is also made a part of plaintiff's Exhibit "19" and is as follows, to-wit:

"The assignee in the above and foregoing assignment, made subject to the approval of the Secretary of the Interior, hereby accepts such assignment and agrees to fulfill all the obligations, conditions and stipulations in said described indenture of lease, when assigned, and the rules and regulations of the Secretary of the Interior applicable thereto, and to furnish proper bond guaranteeing a faithful compliance with said lease and this agreement.

In witness whereof, the said assignee has hereunto set hand and seal this 28th day of Jan., 1914.

Bull Head Oil Co.

Attest:

By E. Dunlap,

T. H. Dunn, Sec. (Seal)

Pt."

Plaintiff next introduced plaintiff's Exhibit "20," being a report of Dana H. Kelsey, United States Indian Superintendent, recommending the approval of the assignment to the Bull Head Oil Company, which report is in words and figures as follows, to-wit:

"Union Agency, Five Civilized Tribes

April 5, 1914.

The Honorable,

Commissioner of Indian Affairs,

Sir: I have the honor to submit herewith the proposed assignment to the Bull Head Oil Company of the following oil and gas mining leases:

Lease #27965, dated August 19, 1913, executed by A. N. Thomas as guardian of Allie Daney, a minor full-blood Choctaw citizen, in favor of T. H. Dunn & J. Robert Gillam. Approved February 8, 1914, containing 40 acres. Consideration for assignment \$5,000.00. No removal of restrictions. Advance royalty paid on this lease to February 3, 1915, annual rental will not accrue until that date. Bond \$1,000.00 Southern Surety Company, surety.

Lease #27983, dated September 13, 1913, executed by Ellis Lowsan as guardian of Leviah Lowson, minor,

full-blood Choctaw citizen, in favor of J. W. Gladney. Approved November 20, 1913, containing 4.33 acres. Consideration for assignment \$2000.00. No removal of restrictions. Advance royalty is paid on this lease to November 20, 1914, annual rental will not accrue until that date. Bond \$1,000.00, Southern Surety Company, surety.

I am submitting herewith a certified copy of articles of incorporation and general financial statement of the Bull Head Oil Company, which shows that this company has an authorized capital stock of 18000 shares of the par value of \$1.00 per share. Stock has been subscribed in the following manner: \$2000.00 to J. W. Gladney in consideration of an assignment to the company of an oil and gas lease upon approval of said assignment by the Secretary of the Interior; \$16000.00 to T. H. Dunn and J. Robert Gillam upon the approval of assignment of oil and gas lease to said company by the Secretary of the Interior. It further states that this company has sufficient funds to fully develop said leases, and said company has no indebtedness. On February 16, D. Lacy, president of the First National Bank of Ardmore, Oklahoma, stated that this company had a balance to this date of \$10991.

The organization of this company was in accordance with an agreement entered into between J. S. Mullen, lessee under lease No. 27893, now on file in this office awaiting completion thereof, and T. H. Dunn and J. Robert Gillam, lessees under lease No. 27965. These leases were in conflict as to all lands described in the subsequent lease. In effecting this compromise the parties lessee entered into a stipulation wherein J. S. Mullen, lessee in the prior lease, requested the Department to disapprove his lease in so far as it covers the lands described in the subsequent lease to Dunn and Gillam, and recommendation to that effect will be made when lease No. 27983 is forwarded to the Department for consideration, in consideration of Dunn and Gillam assigning their lease after approval thereof to an oil company to be subsequently organized, the stock to be equitably distributed between the contesting parties. J. S. Mullen having withdrawn his contest, lease No. 27965 was forwarded to the Department on January 31, 1914, with recommendation that same be approved, and it was stated in that report that in conformity with the agreement an oil company would be subsequently organized, and that Dunn and Gillam would assign their lease in full to said company. It is in pursuance of this agreement that the assignment of lease No. 27965 from Dunn and Gillam to the Bull Head Oil Company is now being submitted to the Department for consideration.

The compromise referred to was brought about at the suggestion of this office as there was conflicting guardianships and litigation and because the land was being drained of oil, and it was necessary that offset wells be drilled at once. Since the approval of this lease Dunn and Gillam have drilled several offset wells on this land.

On February 20, 1914, this office received a telegram from S. H. King, forwarded in behalf of his partner, Mr. McCain, in which he stated that the assignment of lease No. 27965 to the Bull Head Oil Company was made without consulting Mr. McCain, who had an agreement with Dunn and Gillam to the effect that the assignment would not be made without the former's consent, and requested that the matter be set down for hearing before the approval of the assignment. Similar contentions were made by A. N. Funkhouser in a letter to this office dated March 9, 1914. On March 18, 1914, Mr. King was notified that before this matter would be set down for hearing it would be necessary for him to file a written protest with this office setting out fully the grounds upon which he based his objections to the assignment, and a time limit of ten days was prescribed within which to file such formal protest.

On March 26, 1914, a similar notification was sent to Mr. Funkhouser. Neither party complied with this request, but soon thereafter Mr. King communicated with this office by telephone and advised that he desired to withdraw his protest. On March 30, 1914, telegram was received from Mr. Funkhouser, in which he stated that he desired to withdraw his objections to the approval of the assignment. In view of the fact that neither party made a formal protest to this office, and that such protests as were made have been voluntarily withdrawn, and in view of the further fact that this office believes the protests to be absolutely without merit, it is respectfully recommended that they be dismissed.

Application form "B," submitted with each of the above assignments, shows that this company has a paid-up capital of (\$1.00 par value shares) \$16000.00 subscribed and \$5000.00 in its treasury available for oil and gas operations.

Proper affidavits have been furnished by the stockholders of the proposed assignee company showing that they are not interested in Departmental leases covering lands allotted to members of the Five Civilized Tribes in excess of the maximum acreage, while the records of this office show this company to be interested in leases of this character to the extent of approximately 60 acres.

The lessors have been notified of the proposed assignments and submitted no objection to their approval.

Your attention is respectfully called to the fact that in pursuance with a request of the oil inspector that an additional bonus of \$2000.00 be taken out of the proceeds of the sale of the first oil produced, and to be in monthly installments of 25% of the gross monthly runs, exclusive of royalty interest of 12½% as described in the lease, the lessees entered into a stipulation agreeing to pay a bonus consideration as above recited, to be made a part of the lease.

I am submitting herewith bond in the sum of \$2000.00 executed by the lessees as principals, and the Southern Surety Company as surety, guaranteeing the faithful performance of all obligations of said stipulation. Both principals and surety are in good standing with the Department.

I am also submitting herewith stipulation in quadruplicate, executed by the proposed assignee company accepting the conditions of the stipulation as above mentioned and the Southern Surety Company, surety on the bond of the lessees, has consented to the obligations in the stipulation, and agrees that its bond is to remain in full force and effect.

It does not appear from the records of this office that any of the stockholders of the proposed assignee company are interested with any company doing an interstate pipe line business in the State of Oklahoma.

As the regulations have been complied with and the interests of the lessors appear to be fully protected, I submit the papers including the assignment in quadruplicate, two copies of each of the leases, certified copy of articles of incorporation, general financial statement, stipulation and the bonds, and respectfully recommend that the bonds and stipulation be approved and that the assignment be approved subject to Departmental order of July 2, 1910, and as the proposed assignee company has advised the office that it desires to develop the lease immediately upon approval of the assignment, I further respectfully recommend that the matter be given special consideration and that the papers be returned to this office for delivery at the earliest possible date.

Respectfully,

Dana H. Kelsey,
United States Indian Superintendent."

Plaintiff next introduced approval of authority of Bull Head Oil Company to accept assignment, the same being plaintiff's Exhibit "21," and is as follows, to-wit:

"Whereas, E. Dunlap is duly elected, qualified, and acting president of Bull Head Oil Company, a corporation duly organized and existing under the laws of Oklahoma; and

Whereas, T. H. Dunn is duly elected, qualified and acting secretary of said corporation; and

Whereas, both of said persons were president and secretary, respectively, on the 28th day of January, 1914, at which time they executed an acceptance of an assignment of an oil and gas mining lease with A. N. Thomas, guardian, and J. J. Eaves, curator of Allie Daney, allottee of certain lands in the Chickasaw Nation, Oklahoma;

Now, therefore, I, the undersigned president of said corporation, do solemnly swear that the assignment of said oil and gas mining lease mentioned above was duly and regularly entered into by the officers of said corporation as named, by and under authority of the board of directors of said corporation, and in accordance with the by-laws thereof, and further, that said officers were duly authorized and empowered on behalf of the corporation named to execute any and all bonds, applications, or other papers required in connection with said mining lease.

I further certify that the action of said officers in executing the papers mentioned on behalf of said corporation bonds said corporation to a full and complete performance of any and all obligations contained therein.

Dated at Ardmore, Oklahoma, this 28 day of January, 1914.

(Signed) E. Dunlap,
President.

(Corporate Seal)

Subscribed and sworn to before me this 28 day of January, 1914. Fred C. Ryburn, Notary Public. My commission expires March 1, 1917."

Plaintiff here introduced plaintiff's Exhibit "22," being certified copy of application for approval of assignment of oil and gas lease executed by A. N. Thomas, guardian, and J. J. Eaves, curator, which application reads as follows:

"To the Secretary of the Interior:

Bull Head Oil Company, of Ardmore, Oklahoma, herein-after designated as the applicant, hereby applies to have the accompanying assignment of lease embracing 40 acres of land allotted to Allie Daney, a minor, of Talihina, Oklahoma, a citizen of the Choctaw Nation, approved, and agrees that this application shall be considered a part of the lease so described.

The applicant solemnly swears that the assignment of lease, for which approval is requested, is taken in good faith in the interest and for the exclusive benefit of the applicant, and not for speculation or transfer, or as agent for, or in the

interest or for the benefit of any other person, corporation, or association; that no other person, corporation, or association has any interest, present or prospective, directly or indirectly, therein, and that there is no understanding or agreement, expressed or implied, by which the land leases, or any interest in or under the lease by working or drilling contract or otherwise, is to be used, sublet, assigned, or transferred, without the consent of the Secretary of the Interior, first obtained, but that it is taken for the purpose of operation and development under the direction, supervision, and control of the applicant, except as herein stated.

In addition to the leases in the name of the applicant for which approval is requested, the affiant solemnly swears that the applicant is not interested, either directly or indirectly, in oil or gas mining leases or lands in the Five Civilized Tribes, except with the following named persons, corporations, or associations, and that the aggregate of all these interests, together with the leases held by the applicant alone, is not more than 4,800 acres:

Names of person, corporation, or association with whom applicant is interested. None.

Post office address.....

The applicant hereby states that his general business experience for the past five years has been as follows: Company incorporated January 22, 1914, to produce oil and sell the same, and do a general oil and gas business.

The applicant's financial condition as this time is good.

The company has provided for ample funds to develop the lands herein leased.

It is further stated that the applicant's resources are as follows: Stockholders of company are financially able, and propose to, fully develop the property, and use such means as may be necessary to do so and that it has available at least \$5,000.00 for the development of the land covered by said lease.

Where the applicant is a corporation it hereby shows that at this time it has \$5,00 paid up capital and \$16,000.00 subscribed, and \$5,000.00 in the treasury available for oil and gas operations.

It is hereby agreed that on the issue, transfer, or cancellation of stock of corporations, or changes in officers, prompt reports will be made thereof as required by the regulations.

The books and accounts of the applicant covering the business to be carried on under this lease, if approved, will

be kept at Ardmore, Oklahoma, in the custody of T. H. Dunn secretary and treasurer.

The applicant agrees that the money deposited with the United States Indian Superintendent as the first year's advance royalty under said lease shall be and become the property of the lessor if the lease be disapproved because of the lessee's failure to meet the requirements of the law or the regulations of the Department of the Interior applicable thereto or because of any other fault or defect chargeable to the lessee.

References :

Guaranty State Bank, P. O. Ardmore, Oklahoma.

First National Bank, P. O. Ardmore, Oklahoma.

Executed this 28th day of January, 1914, at Ardmore, Oklahoma.

Bull Head Oil Co.,
E. Dunlap, President.
T. H. Dunn, Secretary.

Plaintiff here introduced plaintiff's Exhibit "23," being certified copy of lease by J. J. Eaves, curator, disapproved by the Secretary of the Interior. Copy of lease omitted here, because the same is incorporated in record in connection with defendant's evidence.

Plaintiff next introduced plaintiff's Exhibit "24," being certified copy of request signed by attorneys for J. S. Mullen that the lease on the 40 acre tract of land in controversy executed by J. J. Eaves, curator, to J. S. Mullen be disapproved by the department. Which request, omitting formal parts, is in folds and figures as follows, to-wit:

"June 20, 1914.

Hon. Dana H. Kelsey,
U. S. Indian Superintendent,
Muskogee, Oklahoma.

Dear Sir: Referring to conflicting Departmental leases Nos. 27965, from A. N. Thomas, guardian of Allie Daney, a minor, to T. H. Dunn and J. R. Gillam, and 27983, from J. J. Eaves, curator and guardian of Allie Daney, a minor, to J. S. Mullen, and which contest has been settled so far as the leases covered forty acres described as

The South Half (S $\frac{1}{2}$) of the North West Quarter (NW $\frac{1}{4}$) of the South West Quarter (SW $\frac{1}{4}$), and the West Half (W $\frac{1}{2}$) of the Southwest Quarter (SW $\frac{1}{4}$) of the South

West Quarter (SW $\frac{1}{4}$) of Section Four (4), Township Four (4) South, Range Three (3) West, by an approved assignment to the Bull Head Oil Company.

We have to advise that we are today in receipt of a letter from J. S. Mullen, the lessee under Departmental lease No. 27983, advising that he does not care to further urge the approval of said lease insofar as it covers ninety acres described as

The West Half (W $\frac{1}{2}$) of the North East Quarter (NE $\frac{1}{4}$) of the South East Quarter (SE $\frac{1}{4}$), and the North West Quarter (NW $\frac{1}{4}$) of the South East Quarter (SE $\frac{1}{4}$), and the North Half (N $\frac{1}{2}$) of the South West Quarter (SW $\frac{1}{4}$) of the South East Quarter (SE $\frac{1}{4}$), and the North West (NW $\frac{1}{4}$) of the South East Quarter (SE $\frac{1}{4}$) of the South East Quarter (SE $\frac{1}{4}$) of Section Nineteen (19), Township One (1) South, Range Five (5) West.

This particular one hundred thirty acres was not included in Departmental lease No. 27965, from A. N. Thomas, guardian of Allie Daney, a minor, to T. H. Dunn and J. R. Gillam.

We therefore, have to request, on behalf of J. S. Mullen, the lessee under Departmental lease No. 27983, that the lease be forwarded for disapproval, insofar as it relates to the said ninety acres which was not in contest. We assume that the lease has already been disapproved as to the forty acres in contest, inasmuch as under the compromise agreement J. J. Eaves, as curator and guardian of Allie Daney, a minor, joined in the lease from A. N. Thomas, as guardian of Allie Daney, a minor, to T. H. Dunn and J. R. Gillam.

Respectfully,

Campbell & Beall,
By Wm. O. Beall."

Plaintiff next introduced plaintiff's Exhibit "25," being letter by Dana H. Kelsey, Superintendent of the Five Civilized Tribes to Commissioner of Indian Affairs, recommending lease executed by J. J. Eaves, curator, on the tract of land in controversy, be disapproved. Which letter is in words and figures as follows:

"Muskogee, Oklahoma, June 27, 1914.

The Honorable,
Commissioner of Indian Affairs.

Sir: There is respectfully transmitted herewith for consideration an oil and gas mining lease executed by Allie Daney, minor, by her curator, J. J. Eaves, described as follows:

No. 27983 to J. S. Mullen, lessee, dated August 18, 1913, filed August 23, 1913, containing 130 acres.

12½% royalty.

Approved collective bond—Equitable Surety Company, surety.

\$19.50 advance royalty held by Cashier, credited 8-23-13.
\$13.00 bonus paid lessor.

Forty acres of the land covered by this lease was also covered by lease No. 27965, executed by A. N. Thomas as guardian of this allottee, and later joined in by J. J. Eaves curator, in favor of T. H. Dunn and J. R. Gillam, which lease was forwarded to the Department on January 31, 1914, and approved February 3, 1914, in accordance with a compromise agreement between the conflicting lessees. The records will show that the controversy arose from a case of conflicting guardians, and the forty acres being situated in the heart of the Healdton oil field, it was necessary that the compromise be effected in order to protect the interests of the lessor, whose land was in danger of being drained of oil. The lease referred to which was approved, was executed by both guardian and curator, and received approval by the county courts of Love and LeFlore counties. In so far as the forty acres in controversy were concerned, Mr. Mullen, the lessee in lease No. 27983, heretofore requested that his lease be disapproved. This request was in pursuance of the original agreement and between the parties.

On account of the doubtful validity of the lease now transmitted for consideration, the proper court not having passed upon the matter of the guardianship, Mr. Mullen requested that his lease be withheld a sufficient length of time to enable him to induce A. N. Thomas, guardian in LeFlore County, to also enter into its execution. Had this guardian also joined in the lease, its validity could not have been questioned, and it could have been approved as to the land not contained in the lease of Dunn and Gillam.

On March 24, 1914, all parts of the lease were forwarded to Field Clerk McVay, at Poteau, Oklahoma, with request that he retain same in his custody for a reasonable length of time, within which the lessee might procure the execution of the lease by Mr. Thomas. Mr. Mullen was notified that the lease was in the office of Field Clerk McVay, and that it would be proper for him to secure the signature of A. N. Thomas thereto, if he so desired. I am informed by Messrs. Campbell and Beall, attorneys for Mr. Mullen, that the latter took steps to have Mr. Thomas enter into the execution of the lease, but

his plans did not materialize, the lease remaining in its former state.

On June 16, 1914, Field Clerk McVay returned the parts of the lease to this office. Attorneys for Mullen were notified at once that the lease had been returned, and they were requested to take some action with a view of disposing of the case.

On June 23, 1914, Mr. Mullen, by his attorneys, Campbell and Beall, notified this office that he desired the lease disapproved in its entirety.

Inasmuch as the matter of guardianship has not been determined by the courts, and this lease having been executed by only one of the guardians, or curators, it is very doubtful that if same were approved it would convey any title to the lessee. Consequently I believe it to be to the best interests of the lessor that the lease be disapproved, according to the request of Mr. Mullen, and I respectfully recommend that this action be taken.

It is further recommended that W. M. Baker, Cashier, be authorized to return to J. S. Mullen the sum of \$19.50 which represents advance royalty paid into this office by him under this lease.

Respectfully,

Dana H. Kelsey,
United States Indian Superintendent.

Plaintiff next introduced plaintiff's Exhibit "27," the same being a copy of deed by T. H. Dunn and wife and J. Robert Gillam and wife, to P. C. Dings, dated July 14th, 1915, which deed is in words and figures as follows, to-wit:

"This indenture, made this 14th day of July, A. D. 1915, between T. H. Dunn and N. E. Dunn, his wife and J. Robert Gillam and Blanche Gillam, his wife, of County, in the State of Oklahoma, of the first part, and P. C. Dings party of the second part.

Witnesseth, the said parties of the first part in consideration of the sum of One Dollar and other valuable considerations, the receipt whereof is hereby acknowledged, do by these presents, grant, bargain, sell and convey unto said party of the second part, his heirs and assigns, all of the following described real estate, situated in the County of Carter and State of Oklahoma, to-wit:

NE $\frac{1}{4}$ of SE $\frac{1}{4}$ and E $\frac{1}{2}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 35; and SE $\frac{1}{4}$ of NE $\frac{1}{4}$ less 3.08 acres for A. & C. Ry., Sec 35; and S $\frac{1}{2}$ of SW $\frac{1}{4}$ of NW $\frac{1}{4}$ less 2.25 acres for A. & C. Ry.,

Sec. 36; and E $\frac{1}{2}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ and SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 26, and NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 35, Twp. 4 South and Range 2 East.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, forever.

And said T. H. Dunn, N. E. Dunn, J. Robert Gillam, and Blanche Gillam, for their heirs, executors or administrators do hereby covenant, promise and agree to and with said party of the second part, that at the delivery of these presents, they are lawfully seized in their own right of an absolute and indefeasible estate of inheritance in fee simple of in and to all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, and unencumbered of and from all former grants, titles, charges, judgments, taxes, assessments and incumbrances, of what nature and kind soever and that they will warrant and forever defend the same unto said party of the second part his heirs and assigns, against said parties of the first part, their heirs and all and every person whomsoever lawfully claiming or to claim the same.

In witness whereof, the said parties of the first part have hereunto set their hands the day and year first above written.

T. H. Dunn.

N. E. Dunn.

J. Robert Gillam.

Blanche Gillam."

I.R. \$4.00 cancelled
J. R. G. 7/14/15

Plaintiff next introduced plaintiff's Exhibit "28," the same being a warranty deed dated July 20, 1915, executed by P. C. Dings and wife Alice Dings, to John J. Thomas, conveying the same tract of land described in the deed from Dunn and Gillam to P. C. Dings.

L. S. DOLMAN, witness for plaintiff, testified:

That he was acquainted with Dunn and Gillam; that he appeared as attorney for them at Muskogee; had no agreement at that time for an interest in the lease; was representing Dunn and Gillam at that time and part of the time was representing A. N. Thomas, the guardian, in the contest between the two leases and continued to represent them up to the time of the compromise; never appeared for the Bull Head

Oil Company after it was organized, they did not have any litigation; witness thinks he prepared articles of association for Bull Head Oil Company; has 1000 shares in Bull Head Oil Company, given him for services rendered in connection with the contest and organization and incorporation of the company; did not render any service for Gladney; only services rendered the company was for the organization; services rendered by witness for Bull Head Oil Company was not worth more than \$100.00; was one of the incorporators of Bull Head Oil Company; Dunn never told witness previous to organization of Bull Head Oil Company about agreement between Dunn and Gillam, and Funkhouser and McGowan as testified to here this morning; did not hear anything about that agreement in connection with the organization of the company; pretty sure did not know anything about the contract until the abstract was obtained for the purpose of running the oil, and then we found on the record the contract with D. Thomas and McGowan; did not know of the contract with J. J. Thomas; was present at the first meeting of the directors of the Bull Head Oil Company and most of the meetings; at the time stock was issued does not remember 8000 shares being issued to Mr. Dunn; Dunlap was president; made no inquiry why stock was issued to Dunn, trustee.

T. H. DUNN, witness for plaintiff, testified:

Lives at Ardmore, 1913, lives at Oklahoma City now; entered into a contract on August 19, 1913, with Funkhouser, Earl McGowan and D. Thomas; this contract has been introduced in evidence; does not remember entering into any other contract with Funkhouser and entered into no other contract with Mr. McGowan nor with Mr. D. Thomas; did not enter into any other contract with any of these parties in connection with procuring Allie Daney lease; that contract represents all of the obligations between witness and Gillam on the one side and Funkhouser, McGowan and D. Thomas on the other relative to the procurement of the oil and gas lease in writing or otherwise; that is the only contract I had with them; witness was one of the incorporators of the Bull Head Oil Company; first secretary of the company, elected after the organization and continued as secretary until January, 1917; witness was present at a meeting of the directors of Bull Head Oil Company held at Ardmore, April 7, 1914, at that time directors of the company appraised assets of Bull Head Oil Company at something like a million dollars; that includes the Allie Daney lease and five acres in addition; witness remembers that dividend was paid to stockholders, but does not remember date.

Plaintiff offered in evidence Exhibit "29," from which it appears from the report of directors it was found upon a valuation of \$500,000, same being value of assets of the company, that said company can at this time declare nine per cent dividend upon that valuation.

Witness did not explain to his associates Mr. Gillam and Mr. Dunlap why he had \$8000 stock put in his name; did not tell them anything about the contract that he had just testified about, nor who he was holding the stock as trustee for; Gillam did not know he was holding stock for anybody else, never did tell him about the Funkhouser, McGowan and D. Thomas contract until a long time afterwards. In answer to question by the court, witness said that he did not think his associates knew about the claim of D. Thomas, Funkhouser and J. J. Thomas until after the organization of the company; "just after we organized the corporation, I had this stock issued to me as trustee for so many shares for McGowan and so many shares for each one of them, but I don't know how long after that date before they knew of the particulars but probably right soon," but nothing on either the stock certificates or the stock book or records of the corporation showed who I was trustee for; all it showed was "T. H. Dunn, Trustee."

The minute book of the Bull Head Oil Company was presented to the witness and his attention called to Art. 10 of the by-laws which read as follows:

"All officers shall render written and detailed reports of the business transacted by them at the annual stockholders' meeting or when called upon so to do by the board of directors."

Witness stated that he participated in the making of the first annual report, which reads in part, as follows, to-wit:

"The Bull Head Oil Company's charter was granted and Articles of Incorporation filed with the Secretary of State on January 22, 1914; it was incorporated for the purpose of purchasing 45 acres of leases held in the name of J. W. Gladney, T. H. Dunn and J. Robert Gillam, said leases being located in the center of the Healdton oil field, Carter County, Oklahoma. * * *

In order to provide funds for the development of the property, the board of directors authorized the president and secretary to borrow sufficient money to do so, pledging the properties of the company as security for the payment of the same."

Plaintiff next offered in evidence minutes of the first meeting of the subscribers to the capital stock of the Bull Head Oil Company held at Ardmore on the 24th day of January, 1914, at which meeting, J. S. Mullen, Errett Dunlap, T. H. Dunn and J. Robert Gillam, and L. S. Dolman were present, they being all the incorporators of the company were elected directors for the following year; the directors of the company were authorized to issue the capital stock of the corporation for the full amount authorized by the certificate of incorporation as shall be determined by the board; that T. H. Dunn and J. Robert Gillam made to them and their associates as directors of the Bull Head Oil Company a proposition reciting that they owned a departmental oil and gas lease on the land in controversy, and that they would execute to the Bull Head Oil Company an assignment of the oil and gas lease for 16000 shares of stock to be issued as follows: 8000 shares to J. S. Mullen, full value of which has been received, 8000 shares to be issued to T. H. Dunn, Trustee, which proposition of Dunn and Gillam was duly accepted, and also the directors were to take such action as will vest in said corporation said oil and gas lease and cause to be issued the stock as proposed; the minutes further show that on motion made by Mr. Dolman and carried by unanimous vote, the stock subscribed by him shall be included in the 1000 shares issued to him and the amount paid refunded, and the stock subscribed by Errett Dunlap and J. S. Mullen shall be included in the 8000 shares issued to J. S. Mullen, and the stock subscribed by T. H. Dunn and J. Robert Gillam shall be included in the 8000 shares issued to T. H. Dunn, Trustee, and any sums paid thereon refunded.

Plaintiff also introduced in evidence the minutes of the first meeting of the directors of the Bull Head Oil Company held on the same day, January 24, 1914, from which it appears that all the directors were present, and Mr. Dunn was elected secretary and treasurer for the ensuing year, Mr. Dolman was elected vice-president, the proper officers were directed to execute all proper papers necessary to fully carry out the proposition made by T. H. Dunn and J. Robert Gillam to the company to assign the oil and gas lease to the company.

Plaintiff also offered in evidence what purported to be the by-laws of the Bull Head Oil Company, which reads as follows, to-wit:

“The President and Secretary shall have the right to accept any and all leases, departmental lease on full-blood Indian lands, or commercial leases, and to execute

any and all necessary transfers, assignments, or relinquishments thereof, by, for and in the name of said company."

Witness T. H. Dunn further testified that in connection with the assignment from Dunn and Gillam to the Bull Head Oil Company of the lease, he was required to send to the Interior Department copy of records showing organization of the company and that in that connection witness stated that Art. 10 of the by-laws, above quoted, was regularly adopted by the company. Witness stated that pursuant to the authority conferred on the president and secretary to accept leases on behalf of the company, he and Mr. Dunlap as secretary and president accepted the assignment of the oil and gas lease from Dunn and Gillam. There was 8000 shares of stock issued to witness as trustee, it was held for J. Robert Gillam, Funkhouser, Earl McGowan and J. J. Thomas, and himself; the 8000 shares of stock was immediately surrendered and new certificates were issued; one certificate was issued to T. H. Dunn, which he held as trustee for J. J. Thomas; witness does not know whether J. J. Thomas knew the stock was issued in witness' name or not; witness told him that was the way it would be carried; J. J. Thomas did not pay witness or company anything for stock, did not get it from the company; 666 shares of stock was issued for Mr. Funkhouser to Dunn as trustee; witness does not know whether he would consider he paid the Bull Head Oil Company for his stock or not, he had done services for that stock for the company before the company was organized; did not pay the company anything for it; witness was holding 666 shares of stock for D. Thomas who paid nothing to the company for it; stock was never issued directly to D. Thomas, never got out of Dunn's hands as trustee, until it was sold; 666 shares of stock was issued to Dunn as trustee for Earl McGowan; Earl McGowan paid \$66.00 as assessment on the stock; the first money for the development of the property was raised by assessment of ten per cent, it was not really an assessment, all of them came in and paid ten per cent amount of the stock and they continued to raise the money until about \$10,000 was raised; the stock issued to T. H. Dunn, trustee, was not pledged as collateral to raise the money; the assessments were all paid in after original stock was issued, and all the money paid in on the assessments was paid back to the parties who paid it in before the dividend was paid.

Plaintiff introduced minutes of the directors' meeting held April 6, 1914, Mr. E. Dunlap, president and T. H. Dunn acting as secretary. Mr. Dunn submitted report of his two

weeks' visit on the lease; the president and secretary were authorized and instructed to borrow sufficient money to pay all outstanding obligations for the development of the lease and for the completion of the rigs now under construction, and they were instructed to execute the necessary papers on behalf of the company to borrow said money and pledge the property of the company therefor as security for the payment of the same.

Witness was on the lease frequently and participated actively in the management of the company, stayed on the lease several days, and lived there a good deal of the time.

Defendants introduce the following evidence.

T. H. DUNN, defendant, testified as follows:

"Soon after the original well came in, a few days, five or ten days, Mr. Funkhouser, an attorney from Talihina, came into our office, Dunn and Gillam's office and asked us if we were dealing any in oil leases and we told him we were not. He said he knew where he could get a couple of leases near the Healdton field, and he said if we would furnish the money to pay the expenses that he would give us a half interest in the Allie Daney lease and a third interest in the Helen Bryant lease. The reason Mr. Funkhouser came to our office is that he had known us in Lawton and was desirous of getting a loan—getting an interest in this lease. We asked him how he had happened to get on to this lease, what he knew about it. He said a man had been over there to Talihina trying to get some leases for other parties. He said this man got under the influence of liquor and did some talking and in this talking he made—he spoke of the Allie Daney lease and that is how Mr. Funkhouser happened to get onto it originally, and I saw Mr. Thomas in regard to the lease and Thomas said yes he wanted to lease it. We asked Funkhouser how much it would cost to handle that lease. We told him we did not know anything about oil business. He said it would not cost very much money, and we said why don't you handle it yourself. He said well, I have no money. I have not money enough to pay my grocery bill. We asked him how much it would cost. He said he did not know exactly but might cost one dollar and as much as dollar and seventy-five cents per acre. He said this man who had been over there had offered, made two or three offers on this Allie Daney lease. I think the first offer was twenty-five cents and the second offer fifty cents and before the man left he offered one dollar an acre bonus. He told us we could get this lease, that it would be

necessary for him to give a part of this lease to other associates and, but he would give us a one-half interest if we would furnish the expense money. We asked him who he was going to give this to and he told us. He said he was going to give two-thirds of a one-fourth of it to Earl McGowan and D. Thomas, because they had told him they could get the lease from Raymond Bryant on the land of his child, little Helen Bryant, for which they would give him a two-thirds interest for this interest in the Allie Daney piece, and then he told us he wanted to give a one-fourth interest to J. J. Thomas. We asked him what that was for and he told us Mr. Thomas was well known there and had promised to assist him in getting other leases and he was personally under obligations to Mr. J. J. Thomas. We told him to return and find out just exactly how much money we would have to pay for this lease and to let us know. He returned to Talihina and called us in a day or such matter and said come over, I have arranged to get—I have arranged to get the lease on the Allie Daney land and I have all the papers prepared. We have seen the judge and he is going to be in Poteau on the 19th day of August and he has agreed to approve this lease on that date. How much will it cost, Mr. Funkhouser? He said bring a check for \$70.00 bonus. Make the check payable to Ather N. Thomas, guardian, so that you will have a receipt for your money. I said I will be over there on the morning of the 18th. We had already advanced—Mr. Gillam had already advanced him twenty or twenty-five dollars in money to pay his expenses in helping to get the papers ready. I went over there, got there on the morning of the 18th, about nine or ten o'clock. Mr. Funkhouser met me at the depot and took me over to the hotel and he sat down and told me this story all over, and then he took me to Ather N. Thomas' store before noon, sometime before noon and he introduced me to Mr. A. N. Thomas and said this is Mr. Dunn of the firm of Dunn and Gillam, the man for whom I have made this trip and he has come over to close the deal. I asked Mr. Thomas when it would be convenient to close it and he said he had already made arrangements to close it, to have the judge approve the lease on the morning of the 19th. He knew I was coming by that time and knew what I was coming for.

Judge Williams: Who stated that, Mr. Funkhouser?

A. A. N. Thomas. He said he had made arrangements with the judge to approve the lease on the morning of the 19th. I then asked him some questions in regard to the lease like one would naturally ask. I knew all about it but just wanted to confirm the story Mr. Funkhouser told me. I asked him if he was the guardian of Allie Daney. He said he was and I asked him how many acres in that tract of land and he

told me forty acres and I said well, here is the check for the bonus, the amount Mr. Funkhouser told me you agreed to take seventy dollars. I gave him the check and he immediately went and cashed that check on the 18th day of August there at his own bank."

(Note: Check referred to is here introduced as defendant's Exhibit "H.")

The check was prepared before I left home on August 18th and dated August 19th and cashed on the 18th. I went to A. N. Thomas' house for dinner; A. N. Thomas' wife, his little girl and Allie Daney were present at dinner; no other parties present; Thomas was anxious to get back to the store because he wanted to go to the country that evening and we hurried back and he went to the country and Funkhouser came around in the afternoon and took me to J. J. Thomas' store and introduced me to him; we were up a little towards the front end of the store. Mr. Thomas, in talking with him, I said, I have known of you Mr. Thomas a good many years but you have passed out of my knowledge and we discussed the lumber business and things that had happened a good many years back and he finally—I told him—or Mr. Funkhouser was with me, he introduced me to Mr. Thomas, I told him I came to see him and he said just says step back this way and stepped back to his office leaving Funkhouser in the middle of the store. He asked me if I knew Funkhouser. I told him I did. Wanted to know how long I had known him. I told him, stated a few years, I don't know. Wanted to know if he was dependable. I said yes, I thought he was, never heard anything to the contrary. He said well, he agreed to give me a one-fourth interest in the Allie Daney lease and I had promised to assist him in getting some other leases and closing up some small accounts. After we had talked awhile Mr. Funkhouser and I walked to the hotel and Mr. Funkhouser said I will go and arrange a conference with Mr. D. Thomas for you.

Q. Just a minute, before you go on so we will not have to come back. Was there anything said between you and J. J. Thomas about his holding any stock for Atha N. Thomas?

A. No, sir.

Q. You have related in substance all *the* occurred there?

A. Yes, sir.

Q. Is that right?

A. Yes, sir, and when we went to the hotel, he said I will have to arrange a conference with you for Mr. D. Thomas at his residence after dark. I said why? He said there is very strong enmity between these Thomas' and if they find out you are going to be interested with them in the same lease it might come up we would be able to get it. I said all right, and he made an engagement with D. Thomas and I sat around

the hotel most of the day. I was not doing any milling around town, and in the evening, Mr. Funkhouser came around to the hotel and took me to Mr. D. Thomas' residence. We sat out on the lawn and discussed the proposition and Mr. D. Thomas told me of this agreement that he had made with Mr. Funkhouser whereby they were going to give him two-third's interest in the lease, Helen Bryant lease for the interest in the Allie Daney lease.

Judge Williams: Who told you that?

A. D. Thomas.

Judge Williams: Who was present?

A. Mr. Funkhouser.

Judge Williams: Anybody else present?

A. No, sir, we were sitting outside, and he wanted to know if I would carry this in trust for him and I said yes, that is the way it had to be carried and he said that is all right. In the meantime, later on Mr. Funkhouser came to me with this written agreement that had been between himself, Funkhouser, Mr. *Gowan*, D. Thomas and Dunn and Gillam. He asked me to sign that contract and I said—I discussed it with him, what is this for? He said that is just an agreement whereby you agree to hold this in trust and give them their share of the profits and there was an acknowledgment and I said, well, I don't know about this. Well, he said, that is all right to sign and we will get the lease and if it is approved and if we get no oil or the lease is turned down it will be of no value, so I signed the contract between Funkhouser, D. Thomas and Earl McGowan. That night we left on the night train and Mr. A. N. Thomas and I and we went to Poteau; I paid the railroad fare for both of us; A. N. Thomas went with me to Poteau on the night train and we got there early in the morning; the lease had not been executed and I said we would go to the Government's office and execute this lease; I mean Mr. Mills' office—the field clerk; Thomas said all right and we went up to the field clerk's office and found Mr. Mills there and I said "we want to sign a lease in your presence and witness our signatures and he said all right and we signed the lease and he witnessed the signature and we immediately went to the probate court;" Funkhouser did not go with me—he told me over the phone the papers were all prepared and it would not be necessary for him to go. As soon as the judge came we presented the matter to the judge and he took the paper and stated, "By the way, you are going to have a contest on this." I said "How is that?" He said, "I have received a telegram protesting the approval of this lease, but I am not going to pay any attention to that telegram. If these men wanted to bid on this lease or buy it they should have

been here." And he approved the lease. We got on the train and came back. Mr. Funkhouser met us at the train. Mr. Thomas got off the train and I called to Funkhouser, stated the lease was approved and came on home that day, 19th of August. A few days after that I heard of this contest; I mailed the lease to Muskogee to the United States Indian Superintendent "the place where they go to be approved"; Gillam was in Muskogee at that time and I think I sent the lease to Gillam; that is what Thomas said in his testimony and he may be correct; anyway Mr. Gillam was there and I am quite sure I sent the lease to Mr. Gillam and I came home. A few days after that I heard of this contest, that Mr. Mullins had taken a lease from one J. J. Eaves, curator. That was the first time I knew there was a curator and had taken it on the same day and approved on the same day we had taken—had approved our lease over there.

Q. That is what you heard? A. Yes, sir.

Q. Go ahead and state what you did.

A. Well, then, Mr. Kelsey took the matter up with us and said there had been another lease filed on the land. He said he was going to call for a conference, which he did in September—I think the third or fourth day of September. Mr. Gillam and Mr. Dolman went to that conference and he called four conferencees in the matter in regard to the settlement of the controversy. Finally he said a compromise would have to be effected or would disapprove both leases. Finally he came to Ardmore on the 8th day of January and he said this is final; you men have to settle this difficulty or I will cancel both leases. "This minor's property is being damaged and must be settled." Now he said, "if you will compromise it I will either approve the curator's lease or I will approve the guardian's lease." We had had several conferencees before with the various people here in regard to trying to get together prior to this time. You remember 16th day of November Charley Anderson came to my office and said I would like very well, you boys are friends of mine, would like for you to settle the controversy between yourselves and get down to business and before leaving he indicated he was interested in the lease, I took it that way. A short time after that, December 3rd or 4th, Mr. Jake Hamon and Mr. Mullins came to our office and we tried to compromise and offered, Mullens offered to compromise one-third to himself and one third to Jake and one-third to us, and by taking in the five acres and operate it and when Kelsey came down we got together on a fifty-fifty basis. Contract drawn on 9th day of January, 1913, and as soon as that contract was signed we were holding this lease from that date until the 28th day of January as a trust. On the 28th day of January we wired Mr. Kelsey: "We have assigned the lease to the Bull Head Oil Company

in accordance with the agreement you proposed," and that was this lease was to be approved and we had gone to work on the lease.

(Note: Witness here identifies the defendant's Exhibit No. "9," which is as follows:

"Defendant's Exhibit No. 9.

Agreement, Between J. S. Mullen, party of the first part, and T. H. Dunn and J. Robert Gillam, parties of the second part;

Witnesseth: That whereas there is now pending before the Department of the Interior for approval oil and gas leases as follows:

The oil and gas lease executed by J. J. Eaves, curator of Allie Daney, a minor, approved by the County Court of Love County, Oklahoma; the oil and gas lease executed by A. N. Thomas, guardian of Allie Daney, a minor, approved by the County Court of LeFlore County, Oklahoma; both of which said leases cover the W2 of SW4 of SW4, and S2 of NW4 of SW4 of Section 4, Township 4 South, Range 3 West; and

Whereas, said parties have agreed upon a settlement of the differences concerning the same;

Now, Therefore, as a memorandum of said settlement, it is hereby agreed that said party of the first part will take such action as will result in the Dunn and Gillam lease being executed properly by J. J. Eaves, as curator of Allie Daney, and the curatorship proceedings transferred to LeFlore County, Oklahoma, and that said J. J. Eaves will resign from said curatorship.

That a corporation will be organized under the name of the Bull Head Oil Company, or such other name as will be acceptable, with a capital stock of Eighteen Thousand (\$18,000.00) Dollars; that said parties of the second part shall assign to said corporation, said lease, upon its approval by the Secretary of the Interior.

That said party of the first part will cause to be assigned to said corporation what is known as the "Gladney" oil lease, consisting of five (5) acres of restricted lands, being the W2 of SW4 of NE4 of SW4 of Section 4, Township 4 South, Range 3 West; all of which assignments shall be filed with the Department of the Interior, and such action taken as will perfect the title to the same in said corporation to be organized.

That upon the incorporation and organization of said company, and in consideration of the said assignments, stock shall be issued to party of the first part, or such persons as he may designate, in the amount of \$8,000.00, and to the parties of the second part, or such persons as they may designate, stock in the amount of \$8,000.00, and there shall be issued to L. S. Dolman \$1,000.00 of said stock, which shall be in full payment to him of legal services performed heretofore, and for the incorporation and organization of said company, and perfecting of the title to said leases in said company, and no further. That \$1,000.00 of non-voting stock shall be issued in the name of J. W. Gladney, and said J. W. Gladney, his heirs, administrators and assigns, shall participate in all the revenues and profits of said company, but that said stock shall be marked non-voting, and remain in the care and keeping of the Secretary of said corporation.

It is further agreed that all expense necessary to the perfecting and approval of said lease, and the incorporation and organization of said company, shall be borne equally by the parties hereto.

In Witness Whereof, we have hereunto set our hands in duplicate, on this the 9th day of January, 1914.

J. S. Mullen,
Party of the First Part;

T. H. Dunn,
J. Robt. Gillam,
Parties of the Second Part.

State of Oklahoma, Carter County—ss.

Before me, the undersigned, a Notary Public in and for said county and state, on this the 9th day of January, 1914, personally appeared J. S. Mullen, and T. H. Dunn and J. Robert Gillam, to me well known to be the identical persons who executed the within and foregoing instrument in duplicate, and acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned and set forth. F. M. Adams, Notary Public. (Seal) My commission expires Jan. 11, 1915."

Witness further testified: I don't know whether Mr. Kelsay saw this compromise contract or not, but it was along the line he forced us to compromise and we organized the corporation and when we met and began discussing about a name the Bull Heal Oil Company was announced and no other name was proposed; we named it the Bull Head Oil Company because of the fight we had with Mullen about this lease; Mr. Dunlap suggested it because it was such a bull-headed fight;

this was not in November or December, but in January, and on January 22, we asked for a charter, and on January 28th we had our first meeting and five shares of stock was issued, one each to Mullins, Dunlap, Dolman, Gillam and myself; on the 28th day of January we signed the assignment of the lease; the consideration was sixteen thousand dollars for the Daney lease and two thousand dollars for the Gladney lease, the latter being assigned over by Mullen and covering five acres; this Allie Daney lease on January 28th was worth eighteen thousand dollars because on that date there was an offset well to this property; on offset well had been brought in when we assigned it to the Bull Head; eight thousand dollars of the stock was issued to Mullen and eight thousand issued to me as trustee, and one thousand to Dolman and one thousand to Gladney; Gladney lived at Gainesville, Texas; Gladney's stock was not to be voted; eight thousand dollars in stock was issued to Mullins; the eight thousand issued to me, "T. H. Dunn, Trustee," was held by me in trust for J. Robert Gillam, Earl McGowan, Funkhouser, D. Thomas, and J. J. Thomas; that included all I was to receive for signing over the lease. On January 9th, we got awfully busy developing this property because there was an offset well; first we had to have water to begin drilling and we cleared off the ground and got a rig on there as fast as possible, and we had a well in there in a month. I think it came in in the month of February—that was the first well brought in and we crowded those wells along just as fast as we could until the slump in price came; until the price of crude oil went down. Mr. Kelsey's Department wrote us a letter that it might be well for us to drill only offset wells until such time as oil began to move; my associates were squealing pretty hard on account of assessments I had been calling on them for, with which to develop the property; Earl McGowan furnished sixty dollars, but he never paid any more after that, and neither J. J. Thomas, D. Thomas, nor Funkhouser paid any assessment although I notified all of them by letter; just wrote a letter to each of them; the other associates paid in their part, and I put up the balance; ten wells were drilled up to 1917, but since then I have not had very much to do with the lease; I understand there are nineteen wells on the property now, one of the wells being the deepest well in the field and being about 3700 feet.

Asked to go ahead and tell what else he did while he was in charge of the property, witness said: "During this time these wells were being brought in, there was a creek running across this land and a thousand barrels of oil that came down from above and we went to work and built a trap on this creek and we picked up a thousand barrels of oil in that creek and

put it in our tanks and when it was sold this minor got her share of that money, that never had a barrel come off her land." I got no salary; none of the officers got any salary; we all contributed our money to develop the property and used our automobiles driving out there many and many times.

Witness further stated that on August 18th, the same date witness arrived in Talihina, the witness, Earl McGowan, took a lease from Helen Bryant on the same date; that was the same lease Funkhouser told me he was to have an interest in; I was told by a boy, the notary public, that McGowan went to the country that day and got the lease; was told this along in November or December, I think; after getting this lease from A. N. Thomas, guardian, I went back to Talihina; I think it was in November or December; Gillam and I are interested in a pasture up here (meaning near Ardmore) and many of the allottees of the land included in the pasture live over in that country and three of them live in Talihina. I don't know just what I was over there for, but I remember this time particularly, November or December. I had written A. N. Thomas I had some friends over there preparing to go out hunting and would be there a day or two and would like for him to see they got away in good shape. I was out on this lease very busy and they had put off the hunting trip twice or two weeks on my account so I could go with them. They were over there the last of November or December, I will not say positively. When they got over there, they had brought up some liquor from Texas they were going to take on this hunting trip with them and one of the men in this crowd was inclined to drink a little too much at times and I think he had gotten under the influence of liquor and I thought the best thing I could do was to go over and get them out of town. I got a team and loaded them up and got some groceries and as soon as they got out of town I came back home, but while I was there I went and saw Funkhouser. I said, Mr. Funkhouser, we are going to have to reduce our interest in the Allie Daney lease. He said, how is that? I said, we are going to have to give Mullen an interest, and he said, how much? I said, we might have to give him a half. He went straight up in the air, would not agree to that deal in the world; rather not have anything. I said, you come and go with me to D. Thomas' store and we went and D. Thomas was not there and I told Earl McGowan and Mrs. D. Thomas very likely we would have to cut the lease in two, otherwise Mr. Kelsey said he would cancel the lease, and they assented to it. In the meantime Funkhouser had not assented to the reduction and then went to J. J. Thomas' store and I told him the same thing. I told him I thought it was advisable to do it rather than lose the whole thing, and he acquiesced in the matter.

and I came away from Talihina without Mr. Funkhouser agreeing to that cut at that time, but before we made this assignment or settlement at the request of Mr. Kelsey he had said all right, he would not be out alone, would take his pro-rata; Funkhouser heard McGowan was going to sell the Helen Bryant lease to Fred Chapman and he came here and he did not see us, we were out of town. Mr. Gillam and myself and he employed Cruce and Pottorff and brought suit to keep Earl McGowan from disposing of the McGowan lease and he set up his interest and made us parties. We did not know anything about the suit until it was brought and never had anything to do with it and his name is the only one signed to the court procedure to bring the suit. I was made a party and Judge Russell granted an injunction and then McGowan hired McCain (one of the defendants) and compromised with Funkhouser—that is what Funkhouser told me, and they made a settlement and got Funkhouser to dismiss the case against McGowan. After Funkhouser dismissed the case against McGowan we got the court to bring Funkhouser in the case and then McGowan came over here and we settled the case for two hundred shares of stock in the Bull Head Oil Company, one hundred shares each; we took one hundred shares of stock to Cruce & Pottorff, attorneys, and offered it to them for their attorneys' fees, but they said they had rather have one hundred dollars in cash; while I was at Poteau I told A. N. Thomas, the guardian, that this royalty money, according to my understanding, would be turned over to the guardian and that his bond protected it; the reason I stated that was because he was asking for money; he told me how close he was running financially and everything of that kind, and said he would like to get some money and I told him that I thought the Department turned royalty money over to the guardian and that he could take this money and deposit it in the bank as the guardian of Allie Daney, and say to the bank, "now here is a big deposit that is not going to be disturbed," and in all probability the banker would let him have money enough to bridge him along individually; A. N. Thomas came to see me from time to time after I got that lease and "endeavored to get me to advance him money or other things."

Q. Well, just state what he has done?

A. Well, he has come over here a number of times and always complaining of what a good thing I gave you and you ought to help me—wanted to be handed something and helped along and asked for money. Now after I had talked with him in regard to this deal, then in January, after that, he went to the bank and borrowed some money and he told the banker—

Judge Williams: Which bank?

A. Went to Fort Smith, so he said, to the Merchants and National Bank. I will not be sure about the name of the bank and he told them he was going to have a large amount of money as guardian of Allie Daney, and he got a loan from this bank and later on when this paper, when these notes became due, then he had not made this deposit in this bank, department had not turned over any money to him. I had told him Mr. Kelsey and his father were friends of our family and immediately then he wrote and asked if I would not write Kelsey and get him to turn the money over to him as guardian. He said he wanted to make a lot of loans and I wrote back and told him this is a matter I cannot take up with you in correspondence.

(Note: Witness is here shown plaintiff's Exhibit "3" and says he did not know whether or not he received it, but presumes he did; he identifies Exhibit "4" as his reply.)

Witness further testified: "I don't know what letter this letter refers to, but I remember writing A. N. Thomas a letter, but I don't know whether that letter is a reply of mine to his—

Judge Williams: Here is what that thing says: "Atha, you ought to realize the matter you refer to requires a personal interview and I will make an effort to visit you before the first of the year."

Mr. Johnson: What is the date?

Judge Williams: 11-3-1913. Now why did you have to visit him to have a personal interview about writing or seeing Kelsey about turning this money over?

A. After that he asked me to have—also to take the matter up with the county judge and the county judge holds occasionally in Talihina and he said he wanted me to tell the county judge that he was looking after his ward's interest and what great expense he had been coming over here, backwards and forwards so he could get large bills O. K.ed by the Department because Kelsey would not pay his bills without the O. K. of the county judge, and that is what that referred to.

I never had any private agreement with A. N. Thomas of any kind and I have related all the conferences and agreements I had with him; all I know about trading land for the J. J. Thomas stock is that Mr. Gillam asked me to sign the deed conveying the land to Dings as I was going away to Florida; asked me to do this as a matter of convenience so he could sell or trade the land; the reason I did not convey it over to Gillam so Gillam could sell it or convey it was because I never made deeds to Gillam, never made oil leases to Gillam; whenever we sell a farm we retained a paid up oil lease on the farm and take

it in the name of Dings and Dolman because they were handy and he could execute it at any time we wanted to; I had been using Mr. Dings for that purpose; every time we sold a farm we retained an oil lease on it either in the name of Mr. Dolman or Mr. Dings; Mr. Dings has been my personal banker ever since I have been here, and Mr. Gillam's ever since he has been here; I was away a great deal of the time and Gillam was away occasionally; when we made any transaction of this kind it was done through Mr. Dings who was right here all the time where either one of us could get hold of him when the other was not here; my wife and I signed this deed (meaning the one executed to Dings and then conveyed by Dings over to J. J. Thomas), and that is all I knew about it until after I returned: I never showed A. N. Thomas the land—never had anything to do with it; I didn't know anything about the deal until it was closed; I got my part of the stock in the Bull Head, and I have not disposed of any of my stock except that to my wife; I have bought some stock from various parties; I bought some from Charlie Anderson, and I paid the market value for the stock; I told every associate in the Bull Head Oil Company not to sell their stock under any consideration—I thought the property would be valuable; when Funkhouser sold his stock I was out on the lease and Dunlap called me over the phone and said Funkhouser wanted to sell his stock; he asked me if I wanted to buy and I said no that I had rather he would keep it; Dunlap said if I had no objection he would buy it, but I said I hoped Funkhouser would not sell it; the appraisement of the property the first year was inflated of course; the property was made valuable by ourselves by development; "that is what makes any oil property valuable, but you might think it is worth a million and the other fellow not think it is worth over a hundred thousand;" after the oil went down to thirty cents a barrel we tried to sell the company for a hundred thousand dollars; later we tried to sell it again, but I don't remember the price we tried to get; we could not get any price for oil and could not get rid of the oil; the Corporation Commission prevented drilling wells and "had suit after suit and conference after conference on the production out there;" the Bull Head and all other local companies appeared before the Corporation Commission trying to arrange some way so the oil could be conserved or stored or shipped out by other pipe lines, and I believe in order to get to the pipe line we offered to take much less than the market price for ten thousand barrels of oil, if they would build another line; there was actually a contract to that effect; at that time it was hard to get rid of the oil or store it and we had to shut our wells in and that was very detrimental; that depreciation was along in July, 1914, but it began to come back gradually along in June, 1915; oil is now (the date of the trial) bringing \$1.20 per barrel; Gillam

and myself put up all the expense money assessable against the eight thousand shares for development purposes except the sixty-six dollars Earl McGowan paid; Mullens and his associates contributed their pro rata part but didn't pay any of the pro rata part assessable to the eight thousand shares held in my name as trustee; a good deal of hard feeling arose between Mullens and his associates on one hand and me and Gil-lam on the other hand over the contest before the Department between our lease and the Eaves lease; we were not on good terms.

No cross examination.

L. S. DOLMAN, for Defendant:

I have examined defendant's Exhibit 9; this agreement was presented to Mr. Kelsey, the Indian Agent; when the settlement was made and agreed upon in the form of a contract we presented the whole thing with the assignment to Mr. Kelsey; Mr. Kelsey was here some time in January, 1914, and he "called us together and notified us he was going to reject both leases unless we got together and compromised and we then held a conference and agreed we would split the stock and organize this stock company. Split the stock between the two lease holders. We also agreed we would ask for a refusal of the Mullins lease and Mr. Eaves would sign the Thomas lease and we would then go before the County Court of Love County and have that lease approved as requested by Mr. Kelsey."

Q. Was this done? A. Yes, sir.

Judge Williams: Approve the act of Eaves in signing the A. N. Thomas lease?

A. Yes, sir, he required that to be approved by the County Court of Love County, so that the joint lease will show the approval of both County Courts. We then told him the only way we could do it would be to organize the corporation and assign the lease to the corporation and he said I want all that done right away, because I want this property developed right away because it is being drained by wells, and so we prepared this agreement and presented it to him and he understood it and no doubt—I am surprised it was not in the Department of the Interior and a copy of this agreement along with the papers in this case. I know we sent it to them and explained it to them and he knew all about it. The assignment to the Bull Head was made in accordance with the contract shown by defendant's Exhibit 9; when asked to explain "why the Thomas lease, the guardian's lease was adopted by both sides in preference to the Eaves lease, the curator's lease, both leases being on the same kind of blanks," counsel for plaintiff objected to the question as being incompetent, irrelevant and immaterial. The trial judge said:

"I think that is immaterial. The question is whether this lease was obtained by fraud and the question will arise whether it was valid until it was approved, signed by the curator and approved by the County Court of Love County. I think it is immaterial why they adopted that instead of the other."

Witness testified that the Eaves, curator, lease to Mullins covered a big lot of land in addition to the forty acres involved in this case.

Cross Examination:

(Witness is not familiar with the matters asked about on cross examination and same is omitted because of no importance.)

J. ROBERT GILLAM:

I am one of the defendants; the firm of Dunn and Gillam is a partnership in the real estate business; Dunn and I were not general partners but partners in real estate business; not partners in the oil business; Dunn and I were only interested in two leases, the Allie Daney lease (the one involved in this case) and a lease in Section 2, Township 4 South, Range 3, but I have forgotten the name of the allottee; these leases were handled individually; I had nothing to do with procuring the Allie Daney lease and am not familiar with the facts concerning its procurement; Mr. Dunn procured that lease; I knew A. N. Funkhouser during his life and Dunn and I had an agreement with him with reference to procuring this Allie Daney lease, and that agreement was "Mr. Funkhouser was to give us a half interest in the Allie Daney lease for furnishing the money;" that was the first knowledge I had of the Allie Daney lease; furnished seventy dollars and other expense money; after furnishing the seventy dollars the first connection I had with the lease was when the lease was sent to me at Muskogee to sign; I presented the lease to the Indian Department through Runyan, my attorney; the lease was not approved at that time because of a contest; another lease signed by Eaves as curator was on the same land; I was one of the committee to wait upon Mr. Kelsey with a view to effecting a compromise; Mr. Kelsey knew there were different parties interested in the lease, but I don't know whether he knew who they were; Kelsey didn't know to my knowledge that J. J. Thomas and Earl McGowan and these parties had an interest; at the time the lease was approved by the Department, Mr. Kelsey or the Indian Department knew there were others interested in this lease besides Dunn and Gillam; I mean the Thomas guardian lease also executed by Eaves;

I think Mr. Kelsey was familiar with all the facts in regard to the Mullen interest; Mr. Kelsey suggested a compromise between the Mullen interest and our interest; my part of the stock first issued to Mr. Dunn as trustee was afterwards issued to me individually; issued to me individually just a few days after the corporation was organized—the records will show; later I acquired one hundred shares of stock from McGowan in settlement for my interest in the Helen Bryant lease, and that one hundred shares was issued to me and not to Dunn and Gillam; I also got a hundred and sixty-six and two-thirds shares from Val Mullen, and that was issued to me and not to Dunn and Gillam; I had no knowledge at any time of any interest in this property being owned by the guardian, A. N. Thomas, until the bringing of this suit in the District Court of Carter County; that was my first knowledge or notice; Mr. Dunn and I traded a farm and Fifteen hundred dollars in money for two thousand shares of stock known as the J. J. Thomas stock; Funkhouser told me here in Ardmore that he had traded J. J. Thomas one-half of his one-half interest in that lease in payment of an obligation that he was on understanding he was to assist him in getting other leases; our understanding with Funkhouser was that he was to have a one-half interest in the entire lease originally, and any interest Thomas got was acquired from Funkhouser's interest; neither J. J. Thomas, D. Thomas, nor Earl McGowan acquired any part or any interest out of the T. H. Dunn and J. Robert Gillam one-half interest; I conducted the negotiations for the purchase of the J. J. Thomas stock; "Well, if I remember correctly, Mr. A. N. Thomas was here and wanted to sell his interest—his father's interest, J. J. Thomas's, in the stock of the Bull Head Oil Company. I told him I did not have any money to buy any stock, but I would trade him a farm for it, and he was here with another gentleman by the name of Lunsford, if I remember correctly, and went out to look at the land and he said he would report back to his father and would see if we could make the exchange. Later on he returned with Mr. Bulgin and the deal was closed, the exchange of the land and fifteen hundred dollars for the two thousand dollars or two thousand shares of stock." I was acquiring the stock from J. J. Thomas; that is the way A. N. Thomas represented it to me; A. N. Thomas has called upon me at my office and insisted that he ought to be taken care of in this matter and he seemed to think we had made a good deal of money out of this lease and that we ought to take care of him; I told him I did not think so and he left the office; I ordered him out of the office because "I figured he was trying to black mail me for money;" I don't remember writing plaintiff's Exhibit 8 but possibly I did; it mentions a contract dated August 18, 1913, and when A. N. Thomas

was here trying to buy that land for his father he stated that J. J. Thomas told him that Dunn had given him a written contract and if I was buying the stock I wanted all the outside evidence of the ownership of that stock, and I told him if that was true I would want this assignment or this contract showing he owned this stock and I might have written that letter—I don't remember; I don't now own any stock in the Bull Head, having sold it in the spring of 1918; until the time I sold my stock I did not have any knowledge of the claim of A. N. Thomas of any interest in this lease; I had some correspondence with J. J. Thomas about the sale of this land that was exchanged for his stock.

Witness here identifies defendants Exhibit No. 10, which is as follows:

“Defendant’s Exhibit No. 10.

July 27, 1915.

Mr. John J. Thomas,
Talihina, Oklahoma.

Dear Mr. Thomas: Your letter just received, stating that you had not received the application for loan.

Mr. Wolverton advised me that he had sent you one, and I showed him your letter, and he is today forwarding you another application for execution.

I will keep after him and push the matter along as fast as I can.

Yours truly.”

It was common practice with us to first transfer land to P. C. Dings as a matter of convenience; in this case the particular reason was because Dunn was going away on his summer vacation; I transferred an oil and gas lease to Dings under date of July 17, 1912, for the same purpose; I gave A. N. Thomas a Saxon automobile as a commission on the deal with J. J. Thomas; A. N. Thomas said “He had not made anything, had to have something out of the deal or it would not go through;” that had nothing to do with the purchase price of the stock; A. N. Thomas said he would not recommend that the deal go through without he got something out of it, and that unless he got the car he would see that it didn’t go through; I wanted it to go through and thought it was a good deal; when A. N. Thomas was here the first time he said he would go back and see his father about it, and when he came back he said his father had sent Mr. Bulgin back to close the deal; we made the escrow agreement and he said he would close the deal if I would get him a two thousand dollar loan on the land and I took him to Mr. Wooverton’s office and

Wooverton agreed to secure the loan and that is the reason Wooverton's name is in the escrow agreement; I introduced A. N. Thomas to W. A. Wooverton and told him that we had a deal on with him and his father selling his father some property and that A. N. Thomas said he represented his father and was trading Bull Head stock for the land if he could get a loan of two thousand dollars; I don't believe I ever saw the application signed by J. J. Thomas to Wooverton for the loan.

Cross Examination:

When asked if he had sold his stock to Jake Hamon on April 18, 1918, witness said: "I imagine that is the date;" I had three thousand, two hundred sixty-six and two-thirds shares and one thousand, two hundred and sixty-six and two-thirds shares belonging to my wife; my wife did not have any certificate for the shares I gave her; I sold all this stock to Jake Hamon for Seventy-five Thousand dollars; I sold the stock to Jake Hamon on April 18, 1918, and I got a check for Twenty-five thousand dollars which I cashed on April 20; on April 19, 1918, Hamon executed one promissory note to the order of N. B. Gillam, my wife, for twelve thousand, five hundred dollars due six months after date, and another one for the same amount, dated same, due six months after date, payable to N. B. Gillam; on the same day Jake Hamon executed a note payable to me or my order for Twelve thousand five hundred dollars due in three months after date, and also executed another note for the same amount, payable to me or my order maturing the same time; these four notes aggregate fifty thousand dollars.

(Note: These notes were introduced in evidence and identified by the witness as the Bull Head Company's Exhibits Nos. 2, 3, 4 and 5, and are as follows:

"Bull Head Exhibit No. 2.

Guaranty State Bank, Ardmore, Oklahoma.
Oklahoma State Depository.

When due No. 62411 \$12,500.00 & Int.

Ardmore, Okla. Apr. 19th, 1918.

Six months after date for value received, I, we, or either of us, promise to pay to the order of N. B. Gillam, Twelve Thousand Five Hundred and No/100 Dollars. Payable at Ardmore, Oklahoma, with interest at the rate of 5 per cent per annum from date until paid and ten per cent additional as attorney's fees should this note be placed in the hands of an attorney for collection or judicial proceedings instituted to collect the same. Demand for payment, protest and notice

of dishonor are hereby waived by all parties and we agree to all extensions and partial payments.

(Signed) Jake L. Hamon.

At Guaranty State Bank, P. O. Ardmore, Okla.

Stamped on face. Paid State National Bank

Endorsed on back: For value received I hereby assign this note to J. Robt. Gillam without recourse. N. B. Gillam.

Pay to order of State National Bank, Oklahoma City, Okla. J. Robt. Gillam.

Canceled documentary stamps \$2.50."

"Bull Head Oil Company Exhibit No. 3.

Guaranty State Bank, Ardmore, Oklahoma.

Oklahoma State Depository.

When due No. 62412 \$12,500.00

Ardmore, Okla., Apr. 19th, 1918.

Six months after date for value received, I, we, or either of us, promise to pay to the order of N. B. Gillam, Twelve Thousand Five Hundred and No/100 Dollars. Payable at Ardmore, Oklahoma, with interest at the rate of 5 per cent per annum from date until paid and ten per cent additional as attorney's fees should this note be placed in the hands of an attorney for collection or judicial proceedings instituted to collect the same. Demand for payment, protest and notice of dishonor are hereby waived by all parties and we agree to all extensions and partial payments.

(Signed) Jake L. Hamon.

At Guaranty State Bank, P. O. Ardmore, Okla.

(Stamped) Paid State National Bank

Endorsed on back: For value received I hereby assign this note to J. Robt. Gillam. Without recourse, N. B. Gillam.

Pay to the order of State National Bank, Oklahoma City, Okla. J. Robt. Gillam.

Canceled documentary stamps \$2.50."

"Bull Head Oil Co. Exhibit No. 4.

Guaranty State Bank, Ardmore, Oklahoma.

Oklahoma State Depository.

When due No. \$12,500.00 \$168.40 Int.

Three months after date, for value received, I, we, or either of us, promise to pay to the order of J. Robert Gillam, Twelve Thousand Five Hundred and No/100 Dollars. Pay-

able at Ardmore, Oklahoma, with interest at the rate of 5 per cent per annum from date until paid, and ten per cent additional as attorney's fees should this note be placed in the hands of an attorney for collection or judicial proceedings instituted to collect the same. Demand for payment, protest and notice of dishonor are hereby waived by all parties and we agree to all extensions and partial payments.

(Signed) Jake L. Hamon.

At Guaranty State Bank, P. O. Ardmore, Okla.

Endorsed on back: April 19, 1918. For value received I hereby assign this note to Lillie Coffey. J. Robt. Gillam. Cancelled documentary stamps \$2.50."

"Bull Head Oil Company Exhibit No. 5.

Guaranty State Bank, Ardmore, Oklahoma.
Oklahoma State Depository.

When due July 18, 1918. No.

\$12,500.00 & Interest,
173.61

\$12,673.61

Ardmore, Okla. April 19th, 1918.

Three months after date, for value received, I, we, or either of us, promise to pay to the order of J. Robert Gillam, Twelve Thousand Five Hundred and No/100 Dollars. Payable at Ardmore, Oklahoma, with interest at the rate of 5 per cent per annum from date until paid, and ten per cent additional as attorney's fees should this note be placed in the hands of an attorney for collection or judicial proceedings instituted to collect the same. Demand for payment, protest and notice of dishonor are hereby waived by all parties and we agree to all extensions and partial payments.

#17599 (Signed) Jake L. Hamon.

At Guaranty State Bank, P. O. Ardmore, Okla #9201.

Illegible stamp on face.

Endorsed on back: Pay to the order of the Muskogee National Bank. J. Robt. Gillam.

Cancelled documentary stamps \$2.50.

Pay to the order of any bank or trust Co. All endorsements guaranteed. July 19, 1918. Muskogee National Bank, Muskogee, Okla."

I sold all these notes; the two notes executed to my wife were assigned by her to me without recourse; I sold the note

shown by Bull Head Exhibit No. 4 to Mrs. Lillie Coffey, who lives here in Ardmore; if I discounted the note it was on account of the low rate of interest because no one would want to discount Mr. Hamon's note; I endorsed the note to Mrs. Coffey on April 19, the same day I got it, and she paid me the money for it; I sold the note payable to me, shown by Bull Head Exhibit No. 5, to the Muskogee National Bank, discounting it \$173.61, which represents the difference between five and eight per cent interest; I think that was about two months after I got the note—something like two months after I got it, but I discounted it before it matured; I did not pay my wife anything for the two notes shown by Bull Head Exhibits 2 and 3; she endorsed them over to me before they matured; I put them up as collateral with the State National Bank at Ardmore and borrowed money on them, but I don't know the amount. After I took the notes down as collateral I endorsed both of them over to the State National Bank of Oklahoma City—sold them both to the State National Bank of Oklahoma City at a discount representing the difference between five per cent and eight per cent interest; I sold them to the State National Bank of Oklahoma City before they matured; neither Mrs. Coffey nor the State National Bank of Oklahoma City knew anything about the affairs of the Bull Head Oil Company or the execution of the Allie Daney lease so far as I know, and did not know anything about J. J. Thomas, A. N. Thomas, D. Thomas, or Earl McGowan claiming any interest in the lease; I took the money I got from Hamon for the stock and paid off my debts—used about all of it paying my debts but have a few debts left; I don't know how many acres of land I own but I have a ranch in Muskogee County consisting of about 120 acres deeded land and the balance is leased; I own one-half interest in 110 acres of land here in Carter County and a law suit on fifty acres and am interested in a piece of royalty near Boynton, which brings me fifteen or twenty dollars a month; I have a piece of land east of Nowata from which I get a small royalty; I am interested in no developed oil leases but have some oil stock; one of the companies in which I have stock has a small well; I sold a ranch in Murray County three years ago and got twenty-five thousand dollars; I lost about forty thousand dollars in the cattle business in Muskogee County and the Osage Nation; I own one-half interest in five hundred head of cattle worth about thirty thousand dollars I reckon; I have stock in several corporations; I have about three thousand dollars in one; I lost most of the money in the cattle business last year—along in the spring of 1919; I paid about twenty thousand dollars to the Guaranty State Bank of Ardmore taking up my notes; I don't own any city property except some vacant lots;

if all the oil properties I am interested in paid out I am a man of considerable means; I am not worth one hundred fifty thousand dollars and was not worth that two years ago; I could not say what I am worth but I am not worth what people think I am, as I have been to a great extent speculating in these oil deals; at the time I sold the stock to Hamon I did not say anything to him about Atha Thomas or J. J. Thomas having any interest in the Bull Head.

Re-examination:

The only conversation I ever had with Mr. Bulgin in reference to the Thomas stock was that he, Bulgin, said he was representing John J. Thomas as attorney and came to close this deal; at the time the escrow agreement was signed nothing was said about A. N. Thomas being the real party in interest; Bulgin is one of the attorneys in the original suit filed by A. N. Thomas, guardian, against Dunn and myself and others in the District Court of Carter County; the Saxon roadster A. N. Thomas got was worth from one hundred to one hundred fifty dollars.

Further Cross Examination:

A. N. Thomas told me he wanted a commission first and finally agreed on the Saxon car; he made me believe the deal would not go through unless he got a commission; the commission he got was for making the sale of the John J. Thomas stock for this land; I paid the commission because I did not think the deal would go through without it; I first went out with A. N. Thomas and Mr. Lunsford to show this land—it might have been two weeks before the date of the deed to Dings; A. N. Thomas and Lunsford were over here just before the deed was executed to Dings; the deed was made to Dings for the purpose of Dings deeding it over to J. J. Thomas provided this deal went through, and if the deal did not go through then for the purpose of deeding it to somebody else; we were going to sell the land; the escrow agreement was not made at the time the deed was made to Dings; the deed from us to Dings was made July 14, and the escrow agreement July 20th; I presume the deed from Dings to J. J. Thomas was dated the same day of the escrow agreement; I don't remember what instrument we gave Mr. Dings in connection with the deed, but it was our custom to hold Mr. Dings harmless on the title in case there was a defect; I have no copy of the indemnifying contract with Dings, but as near as I can remember it bound us to stand behind the title; Dunn's and my interest in the oil business was separate; all the deeds were not executed to us as T. H. Dunn and J. Robert Gillam, but some were and some were not, but the majority were is-

sued to Dunn and Gillam—that is in the land business; we might have paid for this lease out of the joint funds and the check issued for the bonus was signed by Dunn & Gillam; I did not have Dings give the five hundred and thousand dollar checks to A. N. Thomas, but to the authorized agent of J. J. Thomas; but don't know who Bulgin turned the checks over to; I gave Dunn & Gillam's check to P. C. Dings and P. C. Dings was authorized to give a check for fifteen hundred dollars to the authorized agent of John J. Thomas, "not a five hundred and a thousand dollar check, but a fifteen hundred dollar check;" I don't know whether Dings gave two checks or not; I don't remember whether I drew the fifteen hundred dollar check to Dings on the account of Dunn & Gillam; I have not the check, but it is quite possible I did draw it on the Dunn & Gillam account; Bob Gillam's money paid half of the seventy dollar bonus on the lease and half of the fifteen hundred dollars paid under the escrow contract to Dings—Gillam's half of Dunn's one-half; I don't remember whether I have heretofore testified that Dunn & Gillam's money paid the fifteen hundred dollars but the facts are as I have stated; Dunn and myself carried a Dunn and Gillam account in the Guaranty State Bank and I think "there is no doubt but what it was drawn on that joint account but then it was charged to us individually;" I mean it was paid out of partnership funds but entered up on our own books as charging each one for his part. Funkhouser came into the office and stated he could get the two leases and would give a half interest in one lease and a third interest in the Helen Bryant lease if we would finance it and we did; but I don't know that Dunn went over there and entered into a written contract entirely different; I knew of the contract he made with Funkhouser, D. Thomas and Earl McGowan just prior to the time the suit was brought to collect our interest in with McGowan, and that was after the Bull Head Company was organized; I think it was in February, 1914; when I learned that Dunn had made the written agreement with D. Thomas, Earl McGowan and Funkhouser I didn't see that that was anything I was interested in; I am not a lawyer; I never saw the contract, but I have seen a copy in the abstract; I don't know whether I asked Mr Dunn about it or not, but we might have discussed it; it was a matter that came out of Funkhouser's interest; Dunn said Funkhouser wanted him to make this arrangement and he did it; I don't know whether the contract bound me or not; Dunn is not my partner in the oil business; I did not kick A. N. Thomas "out quite; he moved before I got to kick him"; that was in April, a couple of years after the escrow agreement, and I think in 1917, but I am not sure; A. N. Thomas was in my office demanding money—said he needed money; I did not know there was an agreement for

a secret interest in Earl McGowan and D. Thomas and did not know there was any such agreement until after the Bull Head Oil Company was organized.

A. N. THOMAS, recalled for further cross examination:

Witness was asked substantially this question: "Did you have a conversation with Mrs. A. N. Funkhouser in Thomas' store in Talihina during the year 1915 in which you stated to Mrs. Funkhouser that you were going to bring suit to cancel Dunn and Gillam's lease and that you wanted her to assist you in cancelling the lease"? to which question the witness responded: "Mrs. Funkhouser was down there on a trip." Whereupon the trial judge said, "Did you have such a conversation with her?" The witness answered, "No, not in that—in an indirect way, I did."

Q. "What did you say?

A. I asked her who purchased the stock of A. M. Funkhouser, something in regard to that, as to the purchase, who purchased the stock"; I did not tell her I was going to bring suit to cancel the lease and did not ask her assistance—I didn't want her assistance; I did not have a conversation with Mrs. Funkhouser ten days or two weeks later in her restaurant or boarding house in the town of Talihina in which I told her I was going to bring suit to cancel the Dunn and Gillam lease and that she could make more money easily by assisting me in cancelling the lease than in running the restaurant, and if she would assist me in cancelling the lease I would see that she was well provided for—I had no such conversation as that, and I don't think she was living there at the time; she had moved to Fort Smith, I think; I have a store at Talihina—have had it I suppose for fourteen or fifteen years; I am thirty-six years old; I rent the store house from my father; the stock of merchandise is worth something like sixteen to twenty thousand dollars; I don't know how much I owe, but I am worth, above all debts and exemptions, five thousand dollars, but not ten thousand.

Re-examination in Chief.

I never had any conversation with Mr. Dunn in which I urged him to get the Indian Agent to turn the royalties over to me, and I had no such conversation with him about depositing the royalties in the bank and getting a line of bank credit—I had a credit without his assistance, "always have had a credit there"; had no conversation with Dunn about seeing the county judge; the county judge would get money from the Department and it was loaned out from time to time.

MRS. A. M. FUNKHOUSER.

I reside at Fort Smith, Arkansas, and am the widow of A. M. Funkhouser; Mr. Funkhouser is dead; we lived at Talihina, Fort Smith and Pawhuska; we lived at Talihina in 1913, at the time the Allie Daney lease was made; I recall the time it was executed; I heard a conversation that day Mr. Dunn was there between my husband and J. J. Thomas with reference to J. J. Thomas' interest in the lease; I went in J. J. Thomas' store and Mr. Funkhouser and J. J. Thomas was talking about the Allie Daney lease and Mr. Funkhouser told Mr. Thomas, the account he had against Mr. Funkhouser, give this account against him and secure the lease from the minor heir, Atha Thomas was guardian, he would give him an interest in the lease with the understanding Atha did not have an interest in the lease; I don't recall what interest J. J. Thomas was to get; my husband died in the spring of 1914, at the age of sixty-two; he had been in poor health; we were living at Fort Smith at the time of his death; in the spring of 1915 I went to Talihina and stayed there three months; while staying in Talihina in the spring of 1915 I had a conversation with A. N. Thomas, guardian, in the Thomas store in Talihina with reference to a suit to cancel the Dunn and Gillam lease; A. N. Thomas asked me to assist him in the matter and I went on trading and didn't give him any satisfaction at that time; he saw me again about the matter and said he "wanted to bring suit to set aside the lease and asked me if I would help him"; I told him I could not; he told me "if I would assist him to set aside this lease he would see I was well paid"; I didn't ask him how much, but he just asked me if I would assist him; he knew I did not know anything in his favor; he knew I was there at the time with Mr. Funkhouser who was interested in the lease; I had never heard any conversation between him and Mr. Funkhouser; he said at that time that I was "working awfully hard and that would be easier than the work I was doing"; I received a letter from him about this matter in the fall after leaving; the letter is dated September 15th, 1915; I could not say how long before that letter the conversation took place, but sometime in the spring.

(Note: Here the defendant's Exhibit No. 32, being the envelope and the letter, as follows:

"(Envelope)
Return in five days to
A. N. Thomas & Co.,
Talihina, Okla.

(Postmarked)
Talihina Two
..... Cent Postage
15, 3 P. M. Okla. stamp

Mrs. A. M. Funkhouser,
Box 100 A, R. F. D.,
Fort Smith, Ark.

(Letter enclosed)

John J. Thomas

Dry Goods A. N. Thomas & Company
Ladies' Apparel 'Best Place to Trade'
Furnishing Goods
Clothing, Shoes
Groceries.

A. N. Thomas

Talihina, Oklahoma.
Sept. 15/1915.

Mrs. A. M. Funkhouser,
Fort Smith, Ark.

Dear Madam: I wanted to get the address of the Man, who is sueing Dunn & Gillam, about some Bull Head Oil Stock. It seems that your late husband had some kind of intrest and that this person that he disposed of some to is having trouble with Dunn & Gillam.

Very truly,

(Signed) Atha N. Thomas."

Witness further testified: I have received other letters but this is the only one I could find. I burned some letters about two weeks before Mr. Gillam came down there; the envelope shows my correct address at that time; I have a little place, three acres, and I have a truck patch and peddle my stuff—run a little truck wagon at Fort Smith; I received the other two letters after receiving this one "all inquiring about this same matter"; I answered this letter but didn't answer the others; I overheard a conversation between my husband and D. Thomas with reference to D. Thomas' interest; I went with Mr. Funkhouser to D. Thomas' store "and went around to his private office and found D. Thomas and Mr. Funkhouser had just learned Earl McGowan had gotten a lease and he stated to D. Thomas he knew he was to have an interest in the Helen Bryant lease for the interest he got in the Allie Dancy lease and D. Thomas said, yes, and he said he knew Earl McGowan had to divide and he said, yes"; nobody was present except D. Thomas, my husband and myself.

Cross Examination.

Lived in Talihina in 1913 about three months with my daughter; Mr. Funkhouser and I were divorced but I don't remember exactly when—it was in Illinois; we were divorced before we came to Oklahoma and remarried in 1912; Mr. Funkhouser was a licensed attorney and had a great many

business transactions; I just remember he was interested in these three leases, but I don't recall any other than the Bryant lease and the Allie Daney lease; he was practicing in Pawhuska at the time and was visiting down at Talihina; my daughter lost her husband and lived there in Talihina with her two children and Mr. Funkhouser told me to stay with her until she moved to Pawhuska; Mr. Funkhouser and I were not then living apart; I don't recall any other business transactions, and that is all the interest I know of down there—all I remember of at that place; just these three leases were all he was trying to get; one of the leases was where Governor Duke was the guardian, but I do not know his interest; D. Thomas was going to help him; I never asked him anything about it; Mr. Funkhouser wanted to get it and D. Thomas had promised to get it; Mr. Funkhouser told me D. Thomas agreed to get it—spoke about the lease Governor Duke was guardian in; did not tell me the facts and I heard no other conversation with anyone else about it; I could not say what time of day exactly I heard the conversation between my husband and J. J. Thomas, but it must have been afternoon some, because I was looking for Mr. Funkhouser as he had not had anything to eat since breakfast; I was hunting him to give him something to eat and found him at J. J. Thomas' store; I did not hear the amount of interest J. J. Thomas was to get; I remember nothing about a written agreement between them, and don't know whether there was to be a written agreement; it was distinctly understood that A. N. Thomas was not to have any interest; I heard Mr. Funkhouser tell that to J. J. Thomas, but he gave no reason that I heard; I did not hear Mr. Funkhouser tell J. J. Thomas that it would not do for A. N. Thomas to have an interest because he was guardian; he did not say if A. N. Thomas had an interest it would make the lease void; Mr. Funkhouser had an interest in the lease; I think his interest was a one-fourth after it was divided up, but I may be mistaken; if I remember right he had a one-fourth and divided it with D. Thomas and Earl McGowan; my husband told me he had a written contract expressing his interest, but he did not tell me that he had given J. J. Thomas a written contract; Mr. Gillam came down last Friday and asked me if I knew anything about the case and I told him. Have been living at Fort Smith since Mr. Funkhouser's death; my attention in the meanwhile has not been called to these matters—not since A. N. Thomas talked with me; I am a hard-working woman and have been all the time making a living for myself and had not discussed this matter with anybody; Mr. Gillam did not tell me what he wanted to prove, but asked me what I knew about the case, and if I could come as a witness; I told him I would come; he did not say he would pay me anything but my ex-

penses; he did not agree to pay anything else; he did not tell me what to tell the court; the conversation with A. N. Thomas was in the spring of 1915; he did not tell me that he had any interest in the lease; nor did he tell me that his father had any interest; just said he was going to bring suit to set aside the lease; I knew his father had an interest, but I did not know how much stock he had, but I knew he was interested; he said he was going to bring suit against Dunn and Gilham to set aside the lease; for testifying he said "he would see I was well paid," but he did not say how much but said he would see I was well paid; did not tell me what to testify, and I did not tell him what I would testify—did not go into details; A. N. Thomas did not suggest any improper method in bringing the suit and did not suggest anything for me to testify; the conversation between D. Thomas and my husband that I overheard was after Earl McGowan had gotten the lease, but I do not know how long after—I mean the lease on the Helen Bryant land; the conversation I heard between my husband and J. J. Thomas was at a different time after the Helen Bryant lease was gotten, but I don't know how much difference; the conversation I heard between my husband and J. J. Thomas was the day Mr. Dunn was there—the 18th of August, 1913; I don't know whether that was a week after or a month after the Helen Bryant lease was made to McGowan; the conversation between my husband and D. Thomas was in D. Thomas' store in his private office with nobody present except D. Thomas, my husband and myself; Mr. Funkhouser told D. Thomas they had agreed for his interest in the Allie Daney lease to give him an interest in the Helen Bryant lease; that is, to give Mr. Funkhouser an interest in the Helen Bryant lease; I left them and went on into the store; I am acquainted with my husband's signature.

Re-examination.

At the time these leases were secured my husband was a very poor man.

R. G. BULGIN, recalled for further re-cross examination:

I am associated with Ledbetter in the case in the District Court and have an interest in the contingent fee, and am associate counsel in this case, appearing here with the consent of the attorney general and the district attorney's office.

P. C. DINGS.

I reside at Ardmore and am president of the Guaranty State Bank; with reference to the conveyance of certain lands to J. J. Thomas, will say, that "Mr. Gillam came to me and asked me if he could put the title to a farm in my name; said Mr. Dunn was going to Florida, uncertain about his return, and that he might have a deal up for the farm and wanted to close it immediately if it came up, and I told him if it would be any convenience to him and Mr. Dunn I would be glad to do it so long as they indemnified me against my warranty"; the land was conveyed to me and I in turn conveyed it to J. J. Thomas; "I was called in from the Country Club one night by Mr. Gillam; stated to me over the phone he had sold this piece of land and wanted me to go to his office when I came in and sign up the escrow papers in the case, in the transaction, and I came in with my wife sometime after dark, stopped over at his office over here on this street and went into his office and was introduced to two gentlemen, Mr. Thomas and a man represented to me as being attorney for John J. Thomas. The escrow agreement was drawn, the attorney executed it and I executed it. Then we went to the bank and the papers were to be escrowed in our bank and I unlocked the vault and got out the draft register and executed the two cashier checks to John J. Thomas, one for five hundred and one for a thousand and delivered those cashier checks and put the papers in the bank and went home."

(Note: Witness here identifies the escrow agreement, plaintiff's Exhibit 6.)

There was nothing attached to the escrow agreement except a Bull Head stock certificate; the assignment of the stock certificate was not attached; I don't remember discussing the assignment of J. J. Thomas' right, title and interest in the stock, but the papers were returned to me to be held in the bank in escrow; my wife and I did not execute the deed that night, but the next day or some days after; at the time the deed was executed to me I did not understand that this land had been sold to anybody in particular—nothing said to me at the time about the sale, and, as I said, it was "a matter of convenience on account of Mr. Dunn being away"; nothing was said to me about putting it in my name for sale to any particular person or at any specified time; there was nothing in the conversation between myself, Mr. Bulgin and A. N. Thomas indicating that J. J. Thomas was not the real party in interest in the transaction; nothing was said that A. N. Thomas had an interest that I remember of; Dunn and Gillam have placed other land in my name, and also leases; I always permitted them to put things in my name if it was

an advantage to them as a customer of the bank; it is my memory that the stock certificate was with the escrow agreement; (the stock certificate was not issued in the name of J. J. Thomas). I have been engaged in the oil business in the Healdton field and am familiar with the value of leases in that field; I am now and have been for several years familiar with the Allie Daney lease; I am familiar with its value in January, 1914, and would say that it was worth four or five hundred dollars an acre at that time; I was living in Ardmore in August, 1913; leases were selling at that time after the well came in, or about the time it came in, all the way from two to four and six and ten to twenty dollars an acre; I was offered a lease myself that afterwards was very productive for five dollars an acre and would not pay but three and they were very productive and I lost them. (Here plaintiff's Exhibit 7 was exhibited to the witness, being the assignment executed by John J. Thomas, dated July 19, 1915, assigning all his interest in the stock and assets in the Bull Head Oil Company to P. C. Dings.) I may have seen that before I executed the deed; it was evidently there at the time; it has been a long time and I have not talked or thought about this matter and it has gotten out of my mind; I have no independent recollection about every detail, but I have an independent recollection of having seen that assignment; I know the five-acre Gladey lease assigned to the Bull Head and it was worth four or five hundred dollars an acre in January, 1914.

Cross Examiantion.

It is my memory that two thousand shares of stock in the Bull Head in the name of Dunn, Trustee, was attached to the escrow agreement at the time it was delivered to me—I think it must have been attached; I have stated to the best of my judgment and I did not tell you (Mr. Ledbetter) in a conversation about the time this suit was brought that the stock in the Bull Head was the only thing attached that night—I told you just as I am testifying now that my memory was not sufficient for me to remember every detail in that transaction; after the escrow agreement was left with me the deed executed by myself and wife was attached to it, but I could not say how long afterwards; I don't remember whether the assignment (shown by plaintiff's Exhibit 7) was brought to me by Gillam at the same time he delivered to me the deed; if it was not I could not say when it was attached; my memory makes me think, since we have gotten into it, that this paper must have been attached because it is dated a day prior to the execution; the escrow agreement had been prepared before the matter was presented to me; I have the indemnity bond; I went to Gillam's office and was introduced to Bulgin

and A. N. Thomas and it was there the escrow agreement was delivered to me; it had been prepared.

W. A. WOLVERTON:

I am in the farm loan business at Ardmore and was so engaged in 1915; I remember who made the application for a farm loan in behalf of J. J. Thomas—it was J. J. Thomas made the application; I did not see him make it; I think it was young Mr. Thomas, his son, was in my office at the time, but am not sure; A. N. Thomas, I understand.

FRANK M. ADAMS:

I have been living in Ardmore since 1910 and am a member of the bar; I was Mr. J. S. Mullen's legal representative, one of them, in 1913; I recall the lease executed on the Allie Daney forty acres by J. J. Eaves, her curator, to J. S. Mullen; I got the Eaves lease to Mullen approved by the County Court of Love County; I recall that afterwards J. J. Eaves, as curator, executed the same lease A. N. Thomas, guardian had executed to Dunn & Gillam; Eaves executed the Thomas lease here in Ardmore; I don't think I had anything to do with the compromise between Dunn and Gillam and Mullen and his associates until the agreement was made; after Mullen got his lease from the curator and Thomas executed his lease, and they were both sent to Muskogee and filed in the Indian office, the oil field was growing continuously toward this land and the relations became bitter and both sides were calling each other crooks—having a hot fight; I remember the organization of the Bull Head Oil Company; I had the matter up with Mr. Kelsey by letter and in person; Mr. Kelsey came to Ardmore and we discussed the matter a number of times; the contract of January 9, 1914 (the settlement agreement, defendant's Exhibit 9) was exhibited to Mr. Kelsey and we discussed it; the compromise contract between Dunn and Gillam and Mullin was made by the Dunn and Gillam faction and ourselves at the suggestion of Mr. Kelsey; he came here to Ardmore and was very much irritated at the fact that we were permitting offset wells to be drilled against the minor's property and no lease yet on the minor's property, and said the two factions must get together and thereupon some member of our faction (the Mullin faction) went to Dunn and Gillam and they said they would compromise provided we would get the Gladney five acre lease transferred to the Bull Head and then we would split the stock fifty-fifty—that is, one-half to Dunn and Gillam and the other half to Mullen and his associates; the Gladney five acres joins the Allie Daney forty

acres; I was familiar with the value of the oil and gas leases in the vicinity of this land on January 9, 1914; this lease had a market value of from four to five hundred dollars per acre; I got one thousand seventy-one shares of the stock that was issued to Mullen; I paid Mullen—Mr. Dunlap and myself had been instrumental in getting the lease and other leases and I paid Mr. Mullen three or four hundred dollars and possibly the assessments testified to on this property; I mean assessments to develop the property; I got the assessment back; when the assessments were levied Mr. Dunn appealed to the Mullen faction for one-half of the assessment and we had no understanding or agreement among ourselves that the assessment we were paying in was ever to be paid back—in fact the first time I ever got any intimation it was to be paid back was nine or ten months afterwards; we simply advanced the money; we thought it would come back as dividends. At the time the contract (defendant's Exhibit 9) was made and the lease was assigned by Dunn and Gillam to the Bull Head Oil Company and the stock was issued, I had no knowledge, notice or information of any kind that Mr. Dunn and Gillam, as lessees, had entered into any kind of an agreement with A. N. Thomas, D. Thomas, Earl McGowan or J. J. Thomas that either of those parties or Funkhouser was to have any interest in the lease or the stock of the Bull Head Oil Company; I think the stockholders put up for development about ninety-four or ninety-five hundred dollars; we got all that back probably in 1917; I sold my stock in 1914 to Don Lacy for fifty-five hundred dollars; I had and sold Lacy ten hundred and seventy-one shares; at the time I sold to Lacy I did not know anything about A. N. Thomas, D. Thomas, J. J. Thomas or McGowan having any interest, and I learned that A. N. Thomas was claiming an interest some time about 1917—might have been the latter part of 1916; I have owned no stock in the corporation since I sold to Lacy.

Cross Examination:

Nothing material in the cross examination and it is omitted.

J. S. MULLEN:

I am the same J. S. Mullen who obtained a Departmental oil lease from J. J. Eaves, curator of Allie Daney, on the forty acres of land executed on August 13, 1913; when I got the lease I had Mr. Adams, my attorney, file it with the Secretary of the Interior's representative at Muskogee; after filing this lease I learned that Dunn and Gillam had leased from A. N. Thomas, guardian; we had a contest before the Indian

Department's office at Muskogee; this contest brought about strained relations and the feeling became bitter; Mr. Kelsey, Indian Superintendent, took steps to get Dunn and Gillam and myself together and he came here to Ardmore and he had us come to Muskogee; Mr. Dolman was an attorney for Dunn & Gillam and we went to Muskogee and Mr. Kelsey told us he would not approve either one of the leases if we did not get together; after that we got together but the feeling between us was so bitter and so obstreperous that Mr. Kelsey named us the Bull Head Oil Company—Mr. Kelsey suggested it; I have examined defendant's Exhibit No. 9, being the compromise contract of January 9, 1914; with respect to the Gladney lease will say Dunn and Gillam would not yield until we agreed to put in the Gladney five acre lease, one-half of which indirectly went to pay Dunn and Gillam's attorney Dolman; Dolman's fee was paid by the issuance to him of one thousand shares of stock which came out of the part represented by Gladney's lease; the capital stock of the Bull Head was eighteen thousand dollars; Dunn and Gillam imposed as a condition of the settlement that the Gladney stock should be non-voting but should participate in dividends; at the time this compromise was made and at the time the Bull Head Oil Company was organized and the stock issued I had no notice, or knowledge or information that A. N. Thomas, or J. J. Thomas, or D. Thomas, or Funkhouser or Earl McGowan claimed or had any interest, secret or otherwise, in the lease executed to Dunn and Gillam by A. N. Thomas, as guardian of Allie Daney; I parceled out the eight thousand shares issued to me; I let Jake Hamon have fifteen hundred shares for which he paid me six hundred or eight hundred or possibly a thousand dollars; J. W. Gladney got a thousand shares of the 2000 shares for putting in his five acre lease; I had an interest in the Gladney lease; the Bull Head had no money when it was organized and we assessed ourselves; my associates and myself represented nine thousand shares of the capital stock and we put up one-half of the money to develop the property; I think it cost something like six thousand dollars; Dunn and Gillam and Dolman put up their part; the corporation paid the assessment back in dividends or refunded to the stockholders—I don't remember which; I subsequently sold my stock to Jake Hamon; I gave part of my stock to my brother Val Mullen; the stock I sold Hamon later on, brought me five or six dollars a share; at the time I sold the stock to Hamon I did not have any notice or knowledge or information that either A. N. Thomas, J. J. Thomas, D. Thomas, Earl McGowan or Funkhouser claimed to have any interest in the lease or the stock of the company; I let Don Lacy have some of my stock; I think Charley Anderson got some and also J. M. Robberson; I know what the departmental lease on the

Allie Daney land was worth the latter part of January, 1914; it was worth about the capital stock of the company, that is, about eighteen thousand dollars.

(Note: It is here agreed between counsel that copies of certain letters included in Exhibit A to Mr. Kelsey's deposition, purporting to have been written by Mullen were written by him and that the copies may be used in evidence with the same effect as if the originals were introduced.)

After the first well came in down here in August, 1913, we looked on it with suspicion—this was an agricultural community and we did not pay much attention right then; when the first well came in in this field I leased land right around there—gave leases away; I think I know the market value of this Allie Daney lease in August, 1913; the most I heard of was twenty dollars an acre on down to four or five dollars an acre; some of it didn't bring anything.

Cross Examination:

As lessee under the J. J. Eaves, curator, lease, I went to Muskogee to look after the matter myself; Mr. Kelsey telephoned to me one day to come up there in person, wanted to talk it over and told Dolman and Dunn and Gillam to come; Dolman and I went but I don't remember whether Dunn and Gillam went; I knew there was a clash between two guardianships and I knew Dunn and Gillam were claiming a lease under the guardian and that I was claiming a lease under the curator; during the controversy I became familiar with the situation as far as the validity of the appointment of Eaves and Thomas was concerned, and I was contending the curator was the proper officer; the Supreme Court of this state had held in *Mullen v. Eaves* that Eaves' appointment was valid and the other appointment was not valid, but Mr. Kelsey would not pass on that; he got stubborn about it and said if we would not do it this way he would not do it any other way; when the Bull Head Oil Company was organized I understood that Dunn and Gillam were to assign over the lease for the capital stock and we appraised the lease at that value; the recitation in the assignment that Dunn and Gillam were assigning the lease for eight thousand dollars was one-half; Eaves did not make any assignment because the lease was made to Dunn and Gillam.

ERRET DUNLAP:

I live in Ardmore and have lived here twenty-three years: I was the first president of the Bull Head Oil Company and am

still its president; I am one of the original incorporators; I was connected with J. S. Mullen in the years 1913 and 1914—was in his employ for five or six years prior to that time; I remember the lease executed to J. S. Mullen by J. J. Eaves, curator of Allie Daney; Mullen phoned to Eaves that he wanted to lease this land and Eaves came in and executed the lease to Mullen; the lease we took from J. J. Eaves, curator, to Mullen on this forty acres embraced in all one hundred thirty acres of land and the bonus was one dollar an acre; the lease included this forty acre Allie Daney tract; I remember the circumstances under which Eaves was prevailed upon to execute the lease already executed to Dunn and Gillam by A. N. Thomas, guardian; we knew J. J. Eaves had been appointed Allie Daney's curator in 1905 by the United States Court for the Southern District in the Indian Territory, and we afterwards learned of the appointment of Thomas by the County Court of LeFlore County; we thought Thomas was guardian of the person only and that Eaves was the curator and still had charge of the property and that is the reason we sent to Eaves and got a lease from him; I was in close touch with the contest before the Department between Dunn and Gillam on the one hand and Mullen on the other and the state of feeling became very strained; I was present at a half a dozen different conferences when the matter was under consideration and finally agreed upon; Mullen offered to compromise on a fifty-fifty basis and Dunn and Gillam would not do that; when the Bull Head was organized there was issued one share to Dolman, on January 28, 1914, one share to J. S. Mullen, January 28, 1914, one share to T. H. Dunn, January 28, 1914, one share to Erret Dunlap January 28, 1914, and one share to J. Robert Gillam January 28, 1914; those were the five incorporators; the corporation was organized January 22, 1914; at the time the Bull Head was incorporated and at the time the stock was issued and the lease assigned I had no knowledge, notice or information that either A. N. Thomas, J. J. Thomas, D. Thomas, Earl McGowan or Funkhouser claimed to have an interest in the Allie Daney lease or the stock in the Bull Head; on January 30, 1914, 8000 shares of stock was issued to T. H. Dunn, trustee, but it did not appear from the books for whom he was trustee; on the same date, January 30, 1914, 8000 shares of stock was issued to J. S. Mullen and 1000 shares to L. S. Dolman and 1000 to J. W. Gladney—Gladney's 1000 being non-voting stock; I got 1072 2/3 shares of the Mullen stock and I paid about \$450.00 for it; subsequently I paid about \$1000.00 towards development; at the time the money was advanced by the stockholders to the company for development purposes there was no agreement that this money would afterwards be refunded; there was such an agreement afterwards made; at the time I got

my stock from Mullen and paid the consideration therefor and at the time I put up the money towards development, I had no knowledge, notice or information of any kind or character that A. N. Thomas, J. J. Thomas, D. Thomas, Earl McGowan or Funkhouser had any claim or claimed to have any interest in the lease or the company; the stock book of the Bull Head shows that certificate No. 6 for 8000 shares to T. H. Dunn, trustee, was cancelled on the same date, to-wit, January 30, 1914, and the following certificates issued, to-wit: One certificate for 666 2/3 shares to T. H. Dunn, Trustee, another certificate for 666 2/3 shares to T. H. Dunn, Trustee, and another certificate for 666 2/3 shares to T. H. Dunn, Trustee; the stock book shows that out of certificate No. 6 for the 8000 shares to Dunn as Trustee, there was also issued a certificate for 2000 shares to T. H. Dunn, Trustee, a certificate to N. E. Dunn for 1500 shares and a certificate to T. H. Dunn for 500 shares and a certificate for 2000 shares to J. Robert Gillam; subsequently I learned that Earl McGowan and D. Thomas had an interest and Earl McGowan and myself bought 666 2/3 shares belonging to D. Thomas and I got half and Earl McGowan got half; we paid \$666.00; Earl McGowan told me that Dunn and Gillam had agreed to carry Funkhouser for an interest and that he and D. Thomas had made some kind of a deal with Funkhouser; Funkhouser also told me that later on; I bought Funkhouser's stock and I believe I paid him \$2500.00; Funkhouser said he got his stock for services in getting the lease for Dunn and Gillam; Funkhouser did not say anything to me about J. J. Thomas or A. N. Thomas having any interest; he said he got an interest for his services and then let D. Thomas and Earl McGowan have a part of his; I wanted to buy the stock so our side would get control of the company; I sold the stock I got from Funkhouser to Val Mullen and I think he gave me three thousand dollars for it; I sold Ed Sandlin half the stock I got from D. Thomas.

Further Direct Examination:

I think I know what the market value of the Allie Daney lease was on January 28, 1914 and I would say five hundred dollars an acre would be a fair market value for it at that time; at the time this contest was pending before the Department at Muskogee in Mr. Kelsey's office and as a part of the compromise arrangement, it was understood that the conflicting guardianships were to be extinguished, and following up the agreement Eaves filed his report and was discharged as curator in Love County—Eaves resigned; the first time I heard that A. N. Thomas was claiming an interest in the lease was when some personal difficulty occurred between Thomas and Bob Gillam in Gillam's office; I met A. N. Thomas

in front of the City Drug store and we went in and had something to drink and he said something about Gillam being in a bad humor—had some argument around Bob's office; he then told me he claimed an interest in the lease but I can not fix the date; I interviewed Gillam about it that very afternoon and I talked with Dunn about it but I don't remember what day; they said A. N. Thomas had no interest but was trying to hold them up; I did not learn at that time that J. J. Thomas was claiming an interest; the Gladney five acre lease and the Allie Daney forty acre lease were and are operated jointly with one power pulley on the wells on all of them; they have separate run tanks for the oil as the Department requires that; that is for the purpose of determining the amount of royalty to be paid the separate lessors; the cost of operation has been a unit and there has been no regard paid to separating that; we could figure out how many gallons of oil we have produced from the five acres; that has been kept separate and we could figure out the overhead charges as to what the cost of operating the five acres was with reasonable certainty; the Bull Head has never paid but one dividend and that was paid on December 28th, 1917; it was ninety thousand dollars; the only other property the Bull Head Company owns besides the Gladney five acre lease and the Allie Daney forty acre lease is twenty acres in fee in the edge of the Healdton field, but there is no production on it; there has been one dry well drilled on the land—it is used as a tank farm; the Bull Head bought it subject to a lease; the Bull Head owns a one hundred sixty acre lease in Cotton County, and we have a drilling contract on sixty-five acres in Cotton County on which there has been one well drilled producing about twenty-five barrels per day; A. N. Thomas, as guardian of Allie Daney, filed a suit against Dunn and Gillam and the Bull Head and other defendants in the District Court of Carter County on April 22, 1918, to cancel this lease; I am sure A. N. Thomas had information as early as 1905 or 1906 that Eaves was Allie Daney's curator; I got that information from checks which bear the endorsement of A. N. Thomas payable to J. J. Eaves, curator, and sent to her father; the one-eighth royalty provided for in the Departmental lease is the customary royalty paid on leases in this country and in the Healdton field.

Cross Examination:

I have had prepared a statement of the assets and liabilities of the Bull Head Oil Company, dated October 15th (Statement is introduced as plaintiff's Exhibit 33); the statement shows \$130,724.78 for lease equipment—actual cost less depreciation; that does not include the valuation on the lease;

that is the cost of equipment on the Allie Daney lease; the average daily production for the past six months has been about three hundred forty to three hundred fifty barrels of oil; that is settled production. I would place the value of the lease not over one thousand dollars a barrel and that would make the lease worth three hundred fifty (thousand) dollars, less the one-eighth; I don't know of a sale being made in this field and I am acquainted with most all of them that sold for more than that; I have in mind that the assessments against the stockholders was approximately ten thousand dollars; whatever was paid in by us under the assessment has been paid back three or four years ago; was not paid back as a dividend, but returned to whoever paid it in; one dividend has been paid and that was paid after the assessment money had been refunded and after all the debts had been paid; total amount of dividend was ninety thousand dollars; the Company has on hand \$79,820.31 deposited in banks and accounts receivable of \$47,634.61; I also bought Charley Anderson's stock; Charley Anderson got his stock from Mullen; I never did ask Dunn the direct question why he had stock put in his name as trustee; I was a little curious to know but never did ask him the direct question; the fact that the first eight thousand shares was issued to Dunn, trustee, did not excite my curiosity but the subsequent issue did, but it was several months after the organization of the Bull Head corporation when I discussed it with Dunn and Dunn did not refer to any parties by name but mentioned a young man at Norman and a young woman both recently married—young people that his wife knew; I don't remember that he called their names; I cannot say that Mr. Dunn ever said that T. P. Gore was the man interested with him in this lease, but I had the idea for a long time that probably Senator Gore had an interest in the lease; I got that idea from conversations with Dunn, but Dunn did not mention Senator Gore's name; Dunn said he had been a friend of Senator Gore's and that he had made or was making some oil investments for the Senator.

Redirect Examination:

The last well drilled on this Allie Daney land was about a month ago; we picked up a stray sand; the dividend paid in December, 1917, was derived from the sale of oil produced while it was cheap and we erected two fifty-five thousand barrel tanks and filled one and practically filled the other and sold them in 1917 and paid the dividend; we made a profit on the steel tanks; some of the oil at the time we put it in the tanks was worth thirty cents a barrel and we sold the tanks and contents for one dollar eighty-five a barrel; the tanks cost us approximately seventeen thousand dollars and there

was approximately fifty-two thousand and some odd hundred barrels of oil in the tanks; we paid the royalty under the Department's requirements as the oil was run into the tanks—as the oil is taken off the lease; we figured by tanking the oil we made ten or twelve thousand dollars profit; I have given my personal attention to the business of the Company as president ever since its organization and without any salary.

A. F. JONES:

This witness testified that he lived in Gainesville, Texas, and that he and his associate, Mr. Whaley, bought five hundred shares of the Bull Head stock; that they paid about ten dollars a share for it and that at the time they bought and paid for the stock they did not have any notice or knowledge or information that either J. J. Thomas, A. N. Thomas, D. Thomas, Funkhouser or McGowan claimed to have any interest in the Allie Daney lease, or in the stock or the company, and that the first time they ever heard of such claim was some time last winter; that the firm of Whaley and Jones have a large business in Gainesville, Texas.

J. W. GLADNEY:

This witness testified that he owned a departmental oil lease on five acres of land joining this Allie Daney 40 acres; that he assigned this lease to the Bull Head Oil Company at the instance of J. S. Mullen and that he got 1000 shares of stock; that he sold part of his stock to Jake Hamon and part of it to Whaley and Jones; that at the time he made the assignment of the five acre lease to the Bull Head and got his stock and at the time he sold his stock to Hamon and to Whaley and Jones, he had no notice, knowledge or information of any kind or character that either A. N. Thomas, J. J. Thomas, D. Thomas, Earl McGowan or Funkhouser had or claimed to have any interest in the Allie Daney lease, or in the stock of the Bull Head Oil Company.

DON RUSSELL:

Witness testified that in November, 1914, he purchased from Frank Adams 1072 shares of the Bull Head stock for which he paid \$5500.00 and that at the time he purchased and paid for said stock he had no notice, knowledge or information that either A. N. Thomas, J. J. Thomas, D. Thomas, Funkhouser or McGowan claimed any interest in the Allie Daney lease or the stock of the Bull Head company.

JAKE L. HAMON:

This witness testified that when the Bull Head Oil Company was first organized he got fifteen hundred shares of stock from Mullen for which he paid one thousand dollars, and that he contributed money towards the development of this lease in the neighborhood of \$3000.00 to \$3500.00; that he got all his money back; that he bought 800 shares of stock in the Bull Head from Earl McGowan for which he paid \$3900.00; that he does not remember the date he bought the stock from McGowan but that the stock books of the company will show; that he purchased from J. Robert Gillam, on April 18, 1918, 3266 2/3 shares of Bull Head Company stock for a consideration of \$75000.00, \$25000.00 paid in cash and the balance evidenced by his four promissory notes heretofore shown as a part of the testimony of J. Robert Gillam; that he paid these notes when they matured; that he paid holders of the notes dollar for dollar; that at the time he bought the stock from Earl McGowan and paid for it and at the time he bought the stock from J. Robert Gillam and paid the consideration therefor, he had no notice, knowledge or information that either A. N. Thomas, J. J. Thomas, D. Thomas, or Funkhouser ever had or claimed any interest in the Allie Daney lease or in the stock of the Bull Head Oil Company, and that at the time he bought the stock from Earl McGowan he did not know where McGowan got it but he supposed he got it in the usual way—by purchase.

Witness testified that he owned 9595 shares of stock in the Bull Head Oil Company and that when he acquired the stock and paid the consideration therefor he had no knowledge, notice or information that either A. N. Thomas, J. J. Thomas, D. Thomas, Earl McGowen or Funkhouser ever had or claimed to have any interest in the Allie Daney lease to Dunn and Gillam.

E. L. McCAIN:

This witness testified that he resides at Pawhuska, Oklahoma, is a lawyer, and that along in February, 1914, he purchased from A. M. Funkhouser what he thought was 666 2/3 shares of stock in the Bull Head Oil Company and paid \$200.00 in cash therefor and a further consideration amounting to something like \$50.00 or \$75.00; that Funkhouser did not have the stock with him and it turned out that he only got one-half of that amount of stock; that at the time he purchased and paid for said stock he had no notice, knowledge or information that J. J. Thomas, D. Thomas, or Earl McGowan claimed to have any interest in the Allie Daney lease;

that he finally got issued to him a certificate of stock in the Bull Head for three hundred thirty-three and one-half shares of stock, but he had to bring a suit to get the stock; that he sued Dunn and Gillam and the Bull Head.

C. F. BENNETT:

Witness testified that he is deputy court clerk of LeFlore County and has charge of the records of the County Court of that county; that he produced in open court the original probate file in the case of A. N. Thomas, guardian of Allie Daney, showing that a petition for the appointment of a guardian for Allie Daney was filed on September 24, 1914, notice given of the hearing of the petition, the court order appointing A. N. Thomas, guardian of Allie Daney on September 30, 1914, letters of guardianship, etc., shown by defendant's exhibits to

Cross Examination:

Witness stated that he did not find among the court papers and files any resignation of A. N. Thomas as guardian of Allie Daney.

(Here the plaintiff's counsel "offers in evidence in connection with the testimony of this witness, plaintiff's Exhibit 34 embracing these records, for the purpose of showing A. N. Thomas was guardian and resigned and was re-appointed.")

T. H. DUNN—Recalled by counsel for the Bull Head.

I don't know off hand how much I am worth above my liabilities and exemptions, but probably anywhere from one hundred to two hundred thousand dollars.

DANA H. KELSEY (by deposition):

I was in the service of the United States Government in the years 1913 and 1914 as United States Indian Superintendent for the Five Civilized Tribes, with general offices at Muskogee, Oklahoma; I recall the Departmental oil and gas lease filed in my office by T. H. Dunn and J. Robert Gillam, lessees, executed to them by A. N. Thomas, guardian of Allie Daney, Choctaw minor, covering the South Half of the Northwest Quarter of the Southwest Quarter, and the West Half of the Southwest Quarter of the Southwest Quarter of Section 4, Township 4 South, Range 3 West, lying in Carter County, Oklahoma, containing forty acres; I also recall a Departmental oil and gas lease being filed in my office about

the same time by J. S. Mullen, as lessee, said lease covering the same land above described with other land and was executed by J. J. Eaves, curator of the same minor, Allie Dany; I think the two leases were dated sometime in 1913.

(Note: Witness here handed "a certified copy of the letters, notices, proceedings, etc., " had in his office in regard to these two leases, said certified copy of the transcript having been made on the 29th day of June, 1918, by Gabe E. Parker, then Superintendent for the Five Civilized Tribes, and witness was asked whether or not he had examined this transcript the afternoon before his deposition was taken, and he said "I have." The certified transcript was identified and made a part of Kelsey's deposition as Exhibit A thereto.)

Witness further testified:

The letters addressed to various parties and shown by Exhibit A were written in my office "and no doubt most of them signed by me, or at my direction; they are all copies of official letters and so recognized by me in examining the certified copies;" I recall having personal interviews with J. S. Mullen, the lessee under the Eaves, curator, lease, and also with Mr. Dunn and Mr. Gillam, lessees under the A. N. Thomas lease.

The following questions and answers appear in the witness' testimony:

Q. Tell how you regarded the situation presented to the Interior Department by the filing of these two leases, the one by Dunn and Gillam and the other to Mullen, executed by Thomas claiming to be the guardian of the minor and by Eaves claiming to be the curator of the minor?

Mr. Ledbetter: Plaintiff objects to the question because no answer that could be given thereto would be competent testimony in this case, and for the further reason it calls for the opinion of the witness on a law question, and would express his opinion as to the matters involved on matters outside of the jurisdiction of the Indian Superintendent's office.

Mr. Ramsey: Mr. Kelsey, by way of explanation of the above question, we are not asking you what your present opinion of that situation was, but what your opinion at that time was; that is, how it was regarded by your office? What way did your office regard that situation presented by those conflicting leases?

A. When these two conflicting leases were brought to my attention as Superintendent the same as any other con-

flicting ones, the first procedure was to notify both parties, as the copies will show in this case, of the filing of the conflicting instruments, to give them an opportunity to show cause why their lease should be approved. When the facts were secured showing that in this particular case there was only one question for consideration, namely, which was the legally appointed guardian entitled to act for this minor Indian, I notified the counsel, and probably the principals also, that it occurred to me that no action of the Department in approving one of these contracts would settle the question of the legality of the guardianship.

Q. Was that the view you took of the situation presented by the filing of these two conflicting leases at that time?

A. Exactly.

Q. Now, Mr. Kelsey, entertaining the view you have indicated by your answers, above, tell what, if anything, you did with that situation before you?

A. Following the procedure of the Interior Department we could have recommended the approval of one of the leases presented, and the disapproval of the other one, but knowing, as I did, the complications with reference to the guardianship I thought that this would not settle the matter, and that in all probability the controversy would get into the courts, and development might be stopped in the meantime, and after carefully considering the matter and securing the report as to the situation in the field, and ascertaining that this was a small tract of land lying almost in the heart of the Healdton oil producing area where active developments were going on, I first notified the counsel for the contending parties that in my judgment this was a case that should be adjusted, and if possible both guardians join in one instrument which then could be approved and without question convey a legal oil and gas mining lease. Later one of the principals, I think Mr. Mullen, called on me and I told him that the matter had dragged along about long enough, that there seemed to be no way of determining this matter without disapproving both contracts; that development had proceeded to such an extent that the lands would soon be drained, and that I thought there certainly was a middle ground somewhere where the two parties could get together, have the guardians both join in one lease or the other, and allow operations to proceed, then let the guardians fight among themselves as to which was the proper person to receive the royalty; that if something along this line was not done very shortly I would recommend the disapproval of both leases, and do whatever I could to see that the two guardians adjusted their troubles among themselves, or both of them sell the lease over again to allow operations to proceed. Mr. Mullen at that time said that there was such bitter feeling between the two parties and that he doubted

they could get together. I think, as the record will show, shortly thereafter I notified by mail the opposing parties that something must be done soon, and that I believed a conference of all the parties together would result in good. I later had this conference at Ardmore in company with the local representative of the Department there. I visited the Healdton field, saw the situation on the ground, saw that the property soon would be drained, and in reality issued an ultimatum to both Dunn and Gillam and J. S. Mullen that unless they did get together on some basis within a very few days, I would recommend both leases for disapproval.

Q. Did you indicate to Mullen and Dunn and Gillam how they could settle the controversy between them; that is the procedure, or method by which they could unite their interests?

A. They, of course, asked me that when we finally got them so they would talk to each other, and I said it didn't make any difference to me whether the Dunn-Gillam lease or the Mullen lease was approved; that if the LeFlore County lease was the one to be approved, the Love County curator should join. If the Love County lease should be approved, that the LeFlore County guardian should join. If one would withdraw or agree to assign an interest to each other, it was a matter absolutely immaterial to me. I was doing what I thought was the duty of an executive officer to protect the interests of the minor.

Q. Did you make any statement to Dunn and Gillam on the one hand, and Mullen on the other, that if they would have both guardians join in one or the other of the leases, and the lessee make an assignment to the other contesting lessee, that you would make any recommendations in regard to the approval of that assignment to the Secretary of the Interior?

A. I did. I said if they did not care to entirely withdraw, one side or the other, that I would recommend an assignment of such part interest as they might agree among themselves upon.

In other words, I suggested to them that if Eaves joined in the Dunn and Gillam lease I would recommend the Secretary to approve an assignment of an interest in that lease from Dunn and Gillam over to Mullen, or vice versa; I am not sure whether or not the parties advised me before I left Ardmore that they had come to an agreement among themselves, or whether they wrote me or wired me thereafter—"I know it was very soon after the conference;" I don't think there was any agreement between these parties at Ardmore "as to which lease would be finally submitted for approval and which would be withdrawn;" I think they advised me "that they

would have both guardians join in one lease, and I sent my Oil Inspector to Ardmore with the original papers and instructed him to investigate the property and make a report to me as to what, if any, increase of the bonus should be assessed up against the lease that we would finally recommend for approval. He was to take these leases to Ardmore for the purpose of allowing one of them to be joined in by the other guardian;" my Inspector took the Eaves lease and the Thomas lease both to Ardmore with him "so that one or the other of them could be executed by the other guardian;" the lease executed by Thomas, guardian, to Dunn and Gillam and subsequently executed by J. J. Eaves, curator, was returned to my office executed in that manner; I recommended its approval to the Secretary of the Interior.

Q. Now, at the time that it was returned to your office executed by Eaves, that is the Thomas lease, were you advised what part or portion of that lease was to be assigned to Mullen by Dunn and Gillam, lessees?

A. No, it was my understanding that these people were not business associates, in fact they were very strong competitors, and it was difficult to get them together at all, and they had decided to form a corporation, and my report so shows, report of January 31st transmitting the lease so shows.

A corporation was organized by Dunn and Gillam and Mullen to take over the lease—its name is Bull Head Oil Company; I recollect how the corporation got its cognomen; "I recollect very distinctly that when Mullen was in my office, or perhaps later at the conference at Ardmore, it was almost impossible for me to make either one of them talk sense about the matter, and I said if the two sides didn't get their bull heads together themselves I would have to do something to make them, and I think it got the name right then;" I remember the filing in my office of the assignment from Dunn and Gillam to the Bull Head Oil Company—the assignment of the whole lease; I recommended the approval of the assignment to the Secretary of the Interior; I don't remember how the stock was to be divided, but suppose the papers showed at that time, as we required a statement of that kind to be filed and to go to the Department along with the papers; the rules and regulations of my Department required the Bull Head Oil Company as assignee of the lease to show who its stockholders were, and no doubt such statement was filed, but I don't remember the details; my Department also required the Bull Head, as the prospective assignee, to make a financial showing of its ability to develop the property before I would recommend the approval of the assignment; such a financial showing must have been made by the Bull Head Oil Company or I would not have recommended the ap-

proval of the assignment; affidavits were required with all applications for approval of assignments showing the capital stock paid in; I remember that "when the terms of the proposed compromise between Dunn and Gillam on the one hand, and Mullen on the other was under negotiations" I made suggestions and advised them in regard to eliminating one of the conflicting guardians.

Q. Why did you make that suggestion?

A. The principal thought I had in insisting upon a compromise so that one lease or the other could be legally approved so as to have the property developed and protected, and if there were two guardians who were going to litigate over who should have the fund, the royalty, the minor might not get the benefit of it for sometime, and I thought in an adjustment of the matter one guardian or the other could be induced to withdraw.

When I was in Ardmore discussing with the parties the settlement I am quite sure I visited the forty acres of land in question; it must have been in December, 1913, or in January, 1914, "I am not sure whether I went out on that particular trip, or just prior thereto, or thereafter, but it was sometime when that thing was before me;" as stated by me I directed the Oil Inspector to investigate the situation with respect to the bonus, to increasing the bonus, and "he made a report to me recommending some increase, which I approved and required the lessees to comply with;" my Oil Inspector, as I recollect, recommended "that the lessees be required to pay a bonus of \$2000.00 out of the first oil produced from the land, after deducting out the one-eighth royalty;" the lessees agreed to pay that and they furnished a surety bond guaranteeing the performance of that obligation; Dunn and Gillam agreed to pay that "and if they assigned it, the assignee accepted the obligation."

Q. Now, at the time the lease was returned to your office, that is the Dunn and Gillam lease executed by Thomas, guardian, and signed also by Eaves as curator, were you advised of the fact that the parties had at that time agreed to form a corporation and to divide the stock among themselves?

A. Well, I am not sure when I was advised that a corporation would be formed, but I think probably something was said about it at the Ardmore conference, because as stated before these people were not business associates, and they thought the matter could be handled by owning stock better than to have individual interests in the lease. I knew it before the lease joined in by both guardians was forwarded to the Department, as my report of January 31st makes the statement that a corporation would be formed.

Q. Now, the record shows, Mr. Kelsey, that you transmitted a letter to the Commissioner of Indian Affairs on January 31, 1914, recommending the approval of this lease executed by Thomas, guardian, and by Eaves, curator, to Dunn and Gillam; I will ask you to state whether or not at that time there had been presented to your office, or you had been notified in any way, that the lessees, Dunn and Gillam, had executed an assignment of that lease to the Bull Head Oil Company, and to refresh your recollection about it I hand you a duplicate copy of the purported assignment to the Bull Head Oil Company, and also in this connection I will call your attention to the following copy of a telegram set out in Exhibit "A" to your deposition, said telegram being dated 28th day of January, 1914?

A. As I remember, as stated before, there was discussion in Ardmore at the time of the conference which resulted in this compromise, that a corporation would be formed, and I am quite sure that in order to protect whichever party whose lease was to be withdrawn, I insisted, to be fair at that conference, that an assignment should be executed for filing before I would recommend the approval of either one of the leases, and this telegram was sent me no doubt in accordance with my request, joined by all parties, stating that the assignment was executed in accordance with that understanding, and I immediately upon receipt of that telegram took steps to prepare the letter transmitting the lease which had been joined in by both guardians, the assignment however not reaching my office until sometime afterwards, as shown by the filing marks.

Q. Was there anything in the condition of the property leading you to send the lease in for approval without awaiting the actual filing of the assignment, and therefore the transmittal of the lease concurrently to the Secretary of the Interior for action at the same time?

A. The Oil Inspector in addition to my own personal information had reported to me that the land was being, or would soon be, drained, and as both guardians had joined in the one lease, and the controversy had been adjusted, it was my business to protect the minor, and I advised the Department to immediately approve the lease, and that a compromise would be effected.

Q. You did that in order that the lessees could go ahead?

A. Might commence operations.

I don't know whether I phoned either Dunn or Gillam or Mullen that I had transmitted the lease on the 31st to the Secretary for his action; they were calling up about it nearly every day, and some lawyers here in Muskogee were over to see me; they had local counsel and also counsel at Ardmore, and some one may have asked me.

Q. After the parties had agreed upon the settlement of the controversy in the manner in which you have detailed, tell whether or not they expressed any desire or intention to immediately begin exploring the property for oil and gas?

A. The record shows that on January 30th my local representative at Ardmore, Mr. S. A. Mills, wired me saying that the lessees in the Allie Daney wanted permission to prepare to drill the offset wells immediately at their own risk, as three wells were already draining the property; there was a notation on this telegram that it was answered by phone on the 31st. I have an indistinct recollection of either telephoning Mr. Mills myself, or directing that he be advised by some of my employees, to the effect that I was that day recommending the lease for approval, and that while I could give no authority for them to take possession of the property, I would certainly not object to them doing as they requested, making all necessary preparations to drill these offset wells, as I wanted the land protected from drainage.

The agreement at the time the lease was forwarded to the Department for approval was that Dunn and Gillam, lessees, should pay the \$2000.00 and "as it had not been paid at the time the assignment was submitted, the Bull Head assumed that obligation, and the assignment was approved upon that condition."

(Note: Witness here identifies plaintiff's Exhibit 15, being the letter written by the plaintiff to the Commissioner of Indian Affairs on January 31st, 1914, and the same is attached as an Exhibit to witness' deposition as Exhibit B thereto, but is not here reproduced, reference being made to the reproduction of the same document in plaintiff's Exhibit No. 15. See page 106 herein.)

I do not remember whether or not I was advised at the time the compromise was made between the parties whether the Eaves lease would be eliminated or the Thomas lease would be eliminated but "the discussion was that one of them would be, and I rather think that Eaves was to be eliminated and Thomas was to remain as guardian;" the purpose in eliminating one of them was to eliminate any controversy about who was entitled to the royalty; I remember making some suggestion that both Thomas and Eaves resign and let one of our Government men or some one they would select be appointed in the County in which the minor resided and settle the trouble.

(Note: The cross examination of Mr. Kelsey was read into the plaintiff's evidence and will be found set forth in this record beginning on page 104.)

Redirect Examination.

Mr. Mullen, lessee under the separate lease executed to him by Eaves, Curator, requested me to disapprove that lease in so far as this forty acres of land covered in the Thomas lease was concerned and "he made that request as a part of this compromise agreement with Dunn and Gillam."

Exhibits to Deposition of Dana H. Kelsey.

Notice of Execution of Lease Upon the Allotment of Allie Daney, a citizen of Choctaw Nation, Roll No. N. B. 1365, by A. N. Thomas, legal guardian (guardian or heir), P. O. Talihina, Okla. Lessee T. H. Dunn and J. Robt. Gillam. P. O., Ardmore, Okla.

Nature of Lease (Oil & Gas—Coal & Asphalt—or other minerals). Oil and gas.

Description of land leased: S2 NW4 of SW4 and W2 of SW4 of SW4, Sec. 4-4S.-3W.

Date of execution by lessor: Aug. 19th, 1913, 9:30 o'clock a. m.

....., Okla., 8-19-13.

Superintendent, Union Agency,
Muskogee, Okla.

Sir:—As required by the regulations notice is hereby given of the execution of the above Departmental lease.

T. H. Dunn, J. Robt. Gillam, Lessees. P. O., Ardmore, Okla.

Note: Lessee or his Agent must file or mail (Registered Letter preferred) this notice to the Union Agency within 24 hours after execution by lessor.

Received Union Agency, Aug. 20, 1913. No.

Notice of Execution of Lease Upon the Allotment of Allie Daney, a citizen of Choctaw Nation, Roll No. 2365, New Born, by J. J. Eaves (Guardian or Heir), P. O., Pooleville. Lessee, J. S. Mullen, P. O., Ardmore, Okla.

Nature of Lease (Oil & Gas—Coal & Asphalt—or other minerals). Oil & Gas.

Description of land: S2 of NW4 of SW4 & W2 of SW4 of SE4 & NW4 of SE4 & N2 of SW4 of SE4 & NW4 of SE4 of SE4 of Sec. 19, Tp. 1 S., T. 5 W.

Date of execution by lessor: Aug. 18, 1913, 10 o'clock a. m.

Ardmore, Okla., 8/18, 1913.

Superintendent, Union Agency,
Muskogee, Okla.

Sir: As required by the regulations notice is hereby given of the execution of the above Departmental lease.

J. S. Mullen, Lessee. E. Dunlap, Agent. P. O., Ardmore, Okla.

Note: Lessee or his Agent must file or mail (Registered Letter preferred) this notice to the Union Agency within 24 hours after execution by lessor.

Received Union Agency, Aug. 20, 1913. No.

Affidavit of Indian Lessor and Lessee. Proof of Bonus, and No Development.

(Must in all cases be properly executed and accompany lease when filed.)

State of Oklahoma, County of Carter—ss.

I, J. J. Eaves, of Pooleville, Oklahoma, being first duly sworn according to law, state upon oath that I am more than 1 years of age, and that under the date of August 18, 1913, I made an Oil and Gas Mining Lease with J. S. Mullen, covering 130 acres; that said lease was read over carefully and explained to me at the time I signed same, and I understand the nature, contents, and effect thereof; that I made said lease in good faith for the purposes therein specified, and now join in the application of the lessee for its approval by the Secretary of the Interior.

I further swear that, other than the terms of the lease described, the only contract, agreement, or understanding between myself and the lessee covering additional payments made or to be made as bonus money, or any other consideration, is as follows: Thirteen dollars (\$13.00) as bonus, of which amount I acknowledge the receipt of \$13.00, the balance, if any, payable, and the following additional agreement:.....

I further state that I have satisfied myself as to the value of this lease, and believe that the amount of bonus offered me as above indicated was reasonable and proper at the date the lease was executed. J. J. Eaves, Guardian.

Witnesses to mark: E. Dunlap, P. O., Ardmore, Okla.; F. M. Adams, P. O., Ardmore, Okla.

(Where lessor does not speak English, Interpreter must sign and be sworn to correctness of interpretation.)

.....
(Signature of Interpreter.)

Subscribed in my presence and sworn to before me this 18th day of August, 1913. In connection therewith, I certify that the above affidavit was fully explained to the Indian lessor, and I am satisfied said lessor fully understands the nature of the lease referred to.

W. F. Freeman, County Judge.

(a) Affidavit of Indian lessor should be sworn to before a United States Commissioner, Indian Superintendent, Local Representative Union Agency, County or District Judge, Federal Judge or Clerk of Federal Court. Where leases are executed by guardians under order of court, affidavit of lessor may be executed before a notary public.

(Over for affidavit of lessee.)

Affidavit of Lessee.

I, J. S. Mullen, of Ardmore, being first duly sworn according to law, state upon oath that I am the lessee or the duly authorized agent of the lessee in the above described lease; that I know of my own personal knowledge that the only bonus to be paid for the execution of said lease, directly or indirectly, by the lessee to the lessor or to anyone for him, is \$13.00, of which \$13.00 has been paid, and \$..... payable, and that the other agreement is precisely as stated by the lessor above; that there has been no operations or drilling for oil or gas by the lessee or anyone for him upon said premises included in said described lease. And That Said Lease Will Be Completed Under the Rules of the Secretary of the Interior With(-) Unnecessary Delay.

J. S. Mullen.

Subscribed and sworn to before me this 25 day of Aug., 1913. E. Dunlap, Notary Public. My commission expires 1-11-1915. (Seal)

Received Union Agency, Aug. 23, 1913. No. 45704.

J. B. Campbell

Wm. O. Beall

Campbell & Beall,
Attorneys at Law,
700-704 Flynn-Ames Building,
Muskogee, Oklahoma.

August 23, 1913.

United States Indian Superintendent,
Muskogee, Oklahoma.

Sir: We enclose herewith oil and gas mining lease, executed in quintuplicate, from J. J. Eaves, the duly appointed, qualified and acting curator, or guardian, of Allie Daney, a

minor, No. 1365 on the final roll of new-born citizens by blood of the Choctaw Nation, enrolled under the Act of Congress of March 3, 1905 (a full-blood Choctaw Indian), to J. S. Mullen, of Ardmore, Oklahoma, covering the:

S2 of the NW4 of the SW4 and W2 of SW4 of SW4 of Section 4, Township 4 South, Range 3 West, and the W2 of the NE4 of the SE4 and the NW4 of SE4 and the N2 of the SW4 of the SE4 and the NW4 of the SE4 of the SE4 of Section 19, Township 1 South, Range 5 West, being 130 acres, and located in the Counties of Carter and Stephens.

Attached thereto will be found the formal application of J. S. Mullen for the approval of the lease; the affidavit of the guardian of the Indian lessor and of the lessee; collective bond of J. S. Mullen in the sum of \$15,000.00 with D. Lacy, J. W. Gladney and E. Dunlap as sureties thereon.

You will also find enclosed certified copies of letters of curatorship issued to J. J. Eaves, as the curator of Allie Daney, a minor, by the United States Court for the Southern District of the Indian Territory, at Pauls Valley, Indian Territory, also certified copies of the petition of the curator for authority to lease the land described in the lease; the order of the County Court of Love County authorizing the guardian to enter into the lease with J. S. Mullen; the petition of the guardian for the approval of the lease to J. S. Mullen and the order of the County Court of Love County, Oklahoma, approving the lease from J. J. Eaves, as guardian or curator of Allie Daney, a minor, to J. S. Mullen.

We have to advise in connection with this guardianship that the case was transferred from the Pauls Valley District of the United States Court to the Southern District of the Indian Territory to the Marietta District on February 1, 1906, and was pending in the Marietta District of the United States Court for the Southern District of the Indian Territory at the time of the admission of Oklahoma to statehood and, by operation of law, was transferred to the County Court of Love County, Oklahoma, at Marietta, where the same is now pending.

We also enclose herewith, cashier's check of the Guaranty State Bank to the order of R. Kessel, Cashier, for \$24.50, being the advance royalty for the first year and the \$5.00 filing fee, as required by your regulations. The \$13.00 bonus paid for the execution of the lease was delivered to the guardian upon the execution of the lease and the approval thereof by the County Court of Love County, Oklahoma.

If there is anything additional required by your office for the approval of this lease, kindly advise the undersigned, as the attorneys for J. S. Mullen, lessee.

Respectfully,

Campbell & Beall,
By W. O. Beall.

WOB-GGC Encls.

Filed with Cashier Aug. 23, 1913. 12-30

Copy Lease 29983 JFK...MES 9-27-13.

Subject: Lease covering allotment of Allie Daney, minor.

September 27, 1913.

Mr. J. S. Mullen,
%Campbell & Beall, Attys.,
Muskogee, Oklahoma.

Sir: Referring to oil and gas mining lease executed by J. J. Eaves, guardian of Allie Daney, minor, in favor of J. S. Mullen, you are advised that further lease has been filed covering the land included in your lease, the same having been executed by A. N. Thomas, guardian of Allie Daney, minor, in favor of T. H. Dunn and J. Robert Gillam. Accompanying said lease is a letter from A. N. Thomas, guardian of the minor lessor, in which he alleges that Mr. Eaves, the guardian in your lease, has never paid any attention to said minor until the present time and has never made any report; that the child has always lived with A. N. Thomas and that he has had charge of her since having been appointed guardian and that he was appointed guardian at the request of the father of said Allie Daney who was not aware of the fact a curator had been appointed.

In view of the allegations made by said A. N. Thomas, it is believed that your lease should be forwarded to the Department with recommendation that the same be disapproved; however, before submitting the same, the office deems it advisable to inform you of the situation in order that you may file such statement or argument you may feel disposed to present showing why your lease should not be disapproved.

If no response is received from you within ten days from date of this notice it will be presumed that you do not care to go further with the approval of the lease and the same will be disposed of accordingly.

Respectfully,

Dana H. Kelsey,
U. S. Indian Superintendent.

Copy Lease 27965 JFK...MES 9-27-13.

Subject: Lease covering allotment of Allie Daney, minor.

September 27, 1913.

Messrs. Dunn & Gillam,
%T. H. Dunn,
Ardmore, Oklahoma.

Sirs: Referring to oil and gas mining lease executed by A. N. Thomas, guardian of Allie Daney, minor, in favor of yourselves, you are advised that the lease appears to be accompanied by the necessary papers; however, the same can not be favorably considered by reason of the fact that a prior lease has been entered into between J. J. Eaves, as curator of said Allie Daney, minor, and said J. S. Mullen, of Ardmore, Oklahoma, which lease bears date of August 18, 1913.

It would therefore appear that your lease should be forwarded to the Department with the recommendation that the same be disapproved; however, before submitting the same, you will be given an opportunity to file such statement or argument you may feel disposed to present showing why such action should not be taken.

If no response is received from you within ten days from date of this notice it will be presumed that it is agreeable with you to have the lease disapproved and such action will be taken.

Respectfully,

Dana H. Kelsey,
U. S. Indian Superintendent.

Received Union Agency Oct. 1, 1913. No. 52824.

9-30-1913.

Hon. Dana H. Kelsey,
Muskegee, Oklahoma.

Dear Sir: I am preparing a protest on behalf of T. H. Dunn and Robert H. Gillam, lessees under a full-blood oil and gas lease upon 40 acres of land allotted to Allie Daney, N. B. Choctaw No. 1365. Rem. B. No. 7578, against the approval of a lease upon some lands to J. S. Mullen.

Please enter my name as attorney for Dunn & Gilliam and let me know what time I have to forward this protest and to what time I have to forward this protest and to what Department.

Yours truly,

LSD-EL

L. S. Dolman.

Copy of Leases Nos. 27965 and 27983 H3-TKK 10/1/13.

Subject: Conflicting leases covering allotment of Allie Daney, minor.

October 1, 1913.

The Honorable,
The Commissioner of Indian Affairs.

Sir: Receipt is acknowledged of your letter of the 17th ultimo enclosing a letter from the Hon. C. D. Carter, member of Congress, relating to a controversy over an oil and gas mining lease covering the allotment of Allie Daney, a minor Choctaw citizen, and requesting to be advised as to what action, if any, has been taken in the premises, also that a report be submitted to you at the earliest possible date.

In reply you are advised that on August 22, 1913, there was filed with this office a lease dated August 19, 1913, by A. N. Thomas as guardian of Allie Daney, minor, in favor of T. H. Dunn and J. Robert Gillam, of Ardmore, Oklahoma, and on August 23, 1913, there was filed a lease dated August 18, 1913, and executed by J. J. Eaves, as curator of Allie Daney, minor, in favor of J. S. Mullen.

Each of the leases above described covers identically the same land and each appears to be complete, except for the fact that they conflict. It further appears that the Office would not be warranted in making a favorable recommendation on either of the leases until the courts shall have determined which is the legally appointed guardian.

The respective lessees have been notified of the conflict in the leases and called upon to submit such statement or evidence as they desire considered in connection with the matter.

As soon as it shall have been determined which of the leases is entitled to favorable consideration by the Department a final report in the matter will be prepared and submitted for your consideration.

Respectfully,

Dana H. Kelsey,
United States Indian Superintendent.

Lease H3-TTK 10/1/13.

Subject: Lease executed in favor of Errett Dunlap., et al.

October 1, 1913.

Mr. Errett Dunlap,
Ardmore, Okla.

Sir: I am in receipt by Departmental reference of a letter from the Hon. C. D. Carter regarding a certain lease exe-

cuted in favor of yourself and associates, on which you desire Departmental action at an early date.

Please furnish the office with the name of the allottee whose lands are covered by the lease in question, and, if the allottee is a minor, kindly give the name of the guardian who executed the lease, also state definitely what interest you have in said lease and the name of the corporation or the names of all parties in whose favor the lease was executed.

In order that the consideration of this lease may not be delayed I ask that the information requested be furnished at the earliest possible date.

Respectfully,

Dana H. Kelsey,
United States Indian Superintendent.

Lease.

Rec. 9-19-13 Land-contracts 109885-13 CCB
Commissioner
Sept. 17, 1913.

Enclosed copy of letter from Hon. C. D. Carter, relative to letter he received from Errett Dunlap, of Ardmore, Okla., in regard to a controversy over an oil lease on the allotment of Allie Daney, minor. Asks for Report as soon as possible.

Enclosure 4220. From Office of Indian Affairs, Department of the Interior.

Refer in reply to the following: Land-Contracts. 109885-13. CCB.

Received Sep. 20, 1913, Union Agency Dept. No. 3198.
Department of the Interior,
Office of Indian Affairs,
Washington.

Sep. 17, 1913

In re Oil lease allotment of Allie Daney.

Mr. Dana H. Kelsey,
Supt. Union Agency.

Sir: There is enclosed herewith copy of a letter from Hon. C. D. Carter, House of Representatives, advising that he has received a letter from Errett Dunlap, of Ardmore, Okla., in regard to a controversy over an oil lease on the allotment of Allie Daney, a minor, made with J. J. Eaves.

Kindly report as soon as possible whether there is a controversy pending at the Agency in connection with the

lease above referred to, and if so, what action has been taken in the premises.

Respectfully,

C. F. Hauke,

Second Assistant Commissioner.

9-WOB-13 27983 27965

Rec. Indian Office Sept. 12-13 -109685

House of Representatives,
Committee on Indian Affairs,
Washington.

September eighth, nineteen thirteen.

My dear Sir:

I am just in receipt of a letter from Errett Dunlap, a very substantial citizen from my home town, Ardmore, calling attention to a controversy over an oil lease on the allotment of Allie Daney, a minor Choctaw, made with J. J. Eaves, the curator appointed by the United States Court of the Southern District of Oklahoma in 1905.

Mr. Dunlap insists that the lease of himself and his associates is the only existing valid one, and asks that he be given opportunity to be heard in the premises before final action is taken and I respectfully ask that his request be granted.

Very truly yours,

C. D. Carter.

Honorable Cato Sells,
Commissioner of Indian Affairs,
Washington, D. C.

Received Union Agency Oct. 4, 1913. No. 53484.

R. P. Harrison

Clerk of United States District Court Eastern District
Muskogee, Oklahoma, Oct. 4th, 1913.

Dana H. Kelsey,
U. S. Indian Superintendent,
Muskogee, Okla.

Dear Sir: On account of the delay occasioned by a failure to procure the necessary data would request that you grant me ten days' additional time to present such protest as may be necessary against the approval of Oil and Gas lease to J. S. Mullens by J. J. Eaves, curator of the estate of Allie Daney, N. B. Choctaw, Roll No. 1365. This protest will be made by Dunn & Gillam under Oil & Gas lease given by A. N.

Thomas guardian of said Allie Daney of LeFlore County, Okla.

Yours very truly,

L. S. Dolman,
Atty. for Dunn & Gillam.

Received Union Agency Oct. 9, 1913. No. 54243.

J. B. Campbell

Wm. O. Beall

Campbell & Beall
Attorneys at Law
700-704 Flynn-Ames Building

Muskogee, Oklahoma, Oct. 8, 1913.

Hon. Dana H. Kelsey,

U. S. Indian Superintendent,

Muskogee, Oklahoma.

Dear Sir: Referring to your letter of September 27th, relative to conflicting oil and gas mining leases Nos. 27965 and 27983, covering the allotment of Allie Daney, a minor, we enclose herewith protest of J. S. Mullen, the lessee under Departmental lease No. 27983, to the consideration of the lease to Dunn and Gillam, the lessees under Departmental lease No. 27965.

Your letter of September 27th was not received by us until October 1st, and we procured this protest from Mr. Mullen at the earliest practicable date.

Steps are now being taken to procure the transfer of the guardianship of Allie Daney in LeFlore County, in which A. N. Thomas is the guardian, to Love County, with a view to having but one guardianship—that of J. J. Eaves—under the jurisdiction of the County Court of Love County.

Respectfully,

Campbell & Beall,
By Wm. O. Beall.

WOB/EKK

Lease 27965 JFK. MES 10-15-13

October 15, 1913.

Subject: Protest against lease covering allotment of Allie Daney, minor, in favor of Dunn & Gillam.

Mr. J. S. Mullen,

c/o Campbell & Beall, Attorneys,
Muskogee, Oklahoma.

Sir: Receipt is acknowledged of your letter of the 8th instant, enclosing protest of J. S. Mullen to consideration of lease covering the allotment of Allie Daney, minor, in favor of Messrs. Dunn & Gillam.

You are advised that the protest will be considered in connection with the case.

Respectfully

Dana H. Kelsey,
U. S. Indian Superintendent.

General Offices: Dana H. Kelsey, Superintendent in charge. Muskogee, Okla.

Received Union Agency Oct. 24, 1913. No. 57000.

Make all remittances for this Agency payable to R. Kessel, Cashier.

Local District Agents' Offices at Vinita, Oklahoma, Nowata, Oklahoma, Sapulpa, Oklahoma, Okmulgee, Oklahoma, Muskogee, Oklahoma, Westville, Oklahoma, Poteau, Oklahoma, Idabel, Oklahoma, Hugo, Oklahoma, McAlester, Oklahoma, Holdenville, Oklahoma, Atoka, Oklahoma, Madill, Oklahoma, Ardmore, Oklahoma, Pauls Valley Oklahoma, Chickasha, Oklahoma.

Department of the Interior
United States Indian Service
Five Civilized Tribes.

Union Agency, Muskogee, Oklahoma.

Subject; In re Probate proceedings Allie Daney matter.

Ardmore, Oklahoma, October 22, 1913.

Hon. Dana H. Kelsey,
United States Indian Sup't,
Muskogee, Oklahoma:

Sir: Under date of October 14, 1913, this office wrote you a report of the proceedings had in the Love County Court, Judge Hayes presiding, in re above matter wherein I reported that the matter came on to be heard and that the case was ordered transferred and that J. J. Eaves filed bond in the sum of \$2,000.

My attention was this day called to my report and wherein same showed that a \$2,000.00 bond was filed upon appeal, if so, the report should have read that a bond of \$2,000.00 to cover the curator was filed and the bond in the appeal was in the sum of \$50.00. Please refer to my letter and make the corrections and additions that the letter may demand, in accordance with the above.

Respectfully,

S. A. Mills,
Field Clerk.

SAM/A

Leases Nos. 27965 and 27983. 10-30-13 RSC-MW.

Subject: Advises would like to have conference in re conflicting leases upon allotment of Allie Daney, minor.

October 30, 1913.

Mr. J. S. Mullen,
Ardmore, Oklahoma.

Sir: In view of the probable necessity of taking some action looking towards offsetting wells which are drilling adjacent to the Allie Daney land, where you hold a conflicting lease, I respectfully beg to advise that this office would be glad to confer at an early date with the lessees in the conflicting leases, or their attorneys. Please take steps to arrange a conference and oblige.

Very truly yours,

Acting United States Indian Superintendent.

Carbon copy to Mr. Wm. O. Beall, Attorney, Muskogee, Oklahoma.

Leases Nos. 27965 & 27983 10-30-13 RSC-MW.

Subject: Advises would like to have conference in re conflicting leases upon allotment of Allie Daney, minor.

October 30, 1913.

Messrs. Dunn and Gillam,
Ardmore, Oklahoma.

Sirs: In view of the probable necessity of taking some action looking towards offsetting wells which are drilling adjacent to the Allie Daney land, where you hold a conflicting lease, I respectfully beg to advise that this office would be glad to confer at an early date with the lessees in the conflicting leases, or their attorneys. Please take steps to arrange a conference and oblige.

Very truly yours,

Acting United States Indian Superintendent.

Carbon copy to Mr. L. S. Dolman, Attorney, Ardmore, Oklahoma.

Received Union Agency, Nov. 4, 1913. No. 59013.

L. S. Dolman, Attorney at Law, Ardmore Oklahoma.

November 3, 1913.

U. S. Indian Superintendent,
Muskogee, Oklahoma.

Dear Mr. Cate: Your letter to Dunn & Gillam, in which you state that you desire a conference between the attorneys

for conflicting lessees on the Ollie Daney lease, received. At any time that it will be convenient to you and the other parties, we will make it convenient to us.

Yours truly,

L. S. Dolman.

(Copy) "CC" RSC-EP 11-15-13, Enclosures.

Subject: In re allotment of Allie Daney.

November 15, 1913.

Messrs. Latham, Semple & Tucker,
Attorneys Choctaw Nation,
McAlester, Oklahoma.

Gentlemen: Replying to your letter of November 13, 1913, stating you have a letter from Field Clerk Mills advising that under date of October 14 he made a detailed report to this office in the case of A. N. Thomas, guardian of Allie Daney, and that Mr. Thomas has asked you to take this matter up for him and request that we forward you all the papers in the case, I beg to enclose herewith a copy of Mr. Mills' report, together with copy of letter from County Judge Bolger at Poteau and our reply thereto. There are pending in this office conflicting oil and gas leases, one executed by A. N. Thomas, guardian of Allie Daney, under authority of the County Court of LeFlore County, and another lease in favor of J. S. Mullen, executed by E. Dunlap, curator under authority of the County Court of Love County. No disposition will be made of these conflicting leases until the matter as to which is the proper guardian is settled, unless oil and gas developments in the immediate neighborhood require immediate action. I will be glad to have you keep me advised as to what action you take relative to the case.

Respectfully,

Dana H. Kelsey,
United States Indian Superintendent.

(Copy) "A" Lease 12-5-13 DHK-MW Lease.

Subject: In re hearing in Allie Daney lease controversy.

December 5, 1913.

Mr. J. S. Mullen,
Ardmore, Oklahoma.

Sir: Referring to our conversation today, and to my telephone communication with Mr. L. S. Dolman, an attorney of Ardmore, with reference to a hearing before me in the Allie Daney lease controversy some time next week, I beg to

advise that unless it is satisfactory to all parties to set this for Monday next, December 8, I would prefer it to be Saturday, December 13, 1913.

Respectfully,

Dana H. Kelsey,
United States Indian Superintendent.

Copy to Mr. L. S. Dolman, Tulsa, Oklahoma.

Subject: In re oil and gas lease on allotment of Allie Daney, a minor.

Poteau, Oklahoma, December 5th, 1913.

Hon. R. S. Cate,

Acting United States Indian Superintendent,
Muskogee, Oklahoma.

Sir: Referring to your phone communication relative to the case of Allie Daney, you are advised that I took this matter up with the District Court this afternoon and Judge Brown informs me that this case is set for December 10th, 1913, that is next Wednesday. The case will more than likely come up on that day and I would suggest that every one interested in it be here. J. H. Gruthis, who represents the appellant Jake L. Hammon, is the attorney of record in this case. No attorney of record appears representing Dunn & Gillam.

Respectfully,

S. A. Mills.
Field Clerk.

CGM-MWS.

"CC" RSC-EP 12-6-13.

Subject: Re Land Allie Daney.

December 6, 1913.

Mr. S. A. Mills,

Field Clerk, Ardmore, Oklahoma.

Sir: Referring to the 40 acres of land allotted to Allie Daney in contest between J. S. Mullen and Dunn & Gillam, please make an immediate visit to this land and advise whether or not, in your judgment, the well which has been drilled adjacent thereto is draining the land, and if so, to what extent? Please give us full report concerning pipe line facilities, etc., for running the oil.

Respectfully,

Dana H. Kelsey,
United States Indian Superintendent.

Received Union Agency Dec. 8, 1913. No. 65254.

Mullen, Mullen & Mullen
Law and Real Estate

Ardmore, Okla., December 6th, 1913.

Hon. Dana H. Kelsey,
Muskegee, Oklahoma.

Dear Sir: I wired you today as follows:

"Referring to Allie Daney Oil and Gas lease, I can not see my way to do more than suggested at our conference, since opposition is unyielding proposed conference would be futile. Suggest hearing."

It is a matter of keen regret to me to be unable to settle this matter, as much on your account as any other largely, but I feel that I have done all that I could to settle this matter on an equitable basis. The other side may look on it differently but of course that is their privilege. I think that the matter can be submitted on an agreed statement of facts, and am asking Mr. Dolman to make up this and submit it to us for our approval.

Very truly,

J. S. Mullen.

Western Union Telegram

Received Union Agency Dec. 8, 1913. No. 65066.

Received at 104 N. Second St., Muskogee, Okla. Phones 1158, 1159. 17 KM C RD C Filed 3PM 31

Ardmore, Okla Dec 6 1913.

Hon Dana H Kelsey
Muskegee Okla

Referring Allie Daney oil and gas lease can not see my way to do more than suggested at our conference since opposition is unyielding proposed conference would be futile suggest hearing

J. S. Mullen 308 PM

"C" Lease No. 27965 RSC-MW Enclosure Register

Subject: Enclosed lease of Allie Daney to Dunn and Gillam. January 8, 1914.

Mr. S. A. Mills, Field Clark,
Ardmore, Oklahoma.

Sir: There is enclosed herewith lease No. 27965, Allie Daney to Dunn and Gillam, covering 40 acres in Section 4, township 4 south, range 3 west, which has been in contro-

versy, and in connection with which Superintendent Kelsey arranged a compromise when in Ardmore recently. The papers are forwarded to you so that the interested parties may have access thereto and have same executed by the other guardian. Please retain same in your custody and return to this office as soon as the other guardian comes in and properly joins in same. When this is done, please return all papers to this office.

Respectfully,

Dana H. Kelsey,
United States Indian Superintendent.

"CC" RSC-EP 1-9-14 Encl.

Subject: Allotment of Allie Daney.

January 9, 1914.

Messrs. Dunn & Gillam,
Ardmore, Oklahoma.

Gentlemen: Referring to oil and gas lease on 40 acres of the Allie Daney land heretofore in controversy between yourself and Mr. J. S. Mullen, I respectfully beg to enclose herewith copy of report of United States Oil Inspector, wherein he fixes the bonus value of said land at the time your lease was taken, at \$100.00 per acre, or \$4,000.00 for the lease. Please forward draft to cover same when the papers in connection with the lease are submitted.

Respectfully,

Dana H. Kelsey,
United States Indian Superintendent.

Received Union Agency Jan. 29, 1914. No. 5720.

Western Union Telegram

Received at 104 N. Second St. Muskogee Okla. Phones 1558 1559 36DA C Filed 314PM"—6 Extra

Ardmore Okla Jany 28 1914

Hon Dana H Kelsey
Muskogee Okla

Assignment of lease has been executed to Allie Daney forty acres in accordance with agreement and will be forwarded immediately

T. H. Dunn
J. R. Gillam
J. S. Mullen 353 P. M.

Received Union Agency, Jan. 31, 1914. No. 6332.

Western Union Telegram

Received at 104 N. Second St. Muskogee Okla Phones 1558 1559 36 DA C 59 Blue Filed 346 PM.

Ardmore, Okla Jany 30 1914

Hon Dana H Kelsey

U S Indian Supt Muskogee Okla

Lessee's ask permission to prepare to drill offset wells on Allie Daney forty in section 4 at their own risk Three wells producing and delivering oil from adjoining lands and locations made for others They are very anxious to protect their interest as well as minors They made assignment and two thousand royalty bond as requested Advise by wire

S. A. Mills 410 P. M.

Phones 1/31 Ans by phone 1-31-13 Filed Lease #27965

Received Union Agency Feb 5 1914 No. 7348

Dunn & Gillam
Financial Agents
Lands, Loans and Investments

Lease 27965 Covering allotment of Allie Daney, Minor.

Ardmore, Oklahoma, 2/3/1914.

Mr. Dana H. Kelsey,

U. S. Indian Superintendent, Muskogee, Oklahoma.

Sir: Please send us the approved lease together with the assignment at your very earliest convenience. We cannot enter into a contract to drill with safety until we have the approved lease in our hands for fear of a contest.

You realize our position in the matter and we trust you will forward the lease as soon as it reaches your office. Please wire us at our expense the day you mail the lease to us and we will immediately proceed to protect our interest as well as the minor's, this is important to all.

Respectfully,

Dunn & Gillam.
D

Telegram

Muskogee, Okla., February 9, 1914.
O. B. G. R. Collect

To Dunn & Gillam, Ardmore, Okla.

Your copy Allie Daney lease mailed to you today.

Kelsey, Supt.

"CC" RSC-EP 1-9-14 Encl.

Subject: Allotment of Allie Daney.

January 9, 1914.

Messrs. Dunn & Gillam, Ardmore, Oklahoma.

Gentlemen: Referring to oil and gas lease on 40 acres of the Allie Daney land heretofore in controversy between yourself and Mr. J. S. Mullen, I respectfully beg to enclose herewith copy of report of United States Oil Inspector, wherein he fixes the bonus value of said land at the time your lease was taken, at \$100.00 per acre, or \$4,000.00 for the lease. Please forward draft to cover same when the papers in connection with the lease are submitted.

Respectfully,

Dana H. Kelsey,
United States Indian Superintendent.

Received Supt. 5 Civ. Tribes Feb 13 1915 16860

Southern Surety Company
Home Office: Surety Building, Muskogee, Oklahoma.

February 12, 1915.

Honorable Gabe E. Parker,
Superintendent for the Five Civilized Tribes,
Muskogee, Okla.

Dear Mr. Parker: Under date of January 29, 1914, Southern Surety Company as surety for T. H. Dunn and J. Robert Gillam as principals, guaranteed the payment of \$2000.00 bonus under lease No. 27965, Allie Daney, minor. Afterwards with consent of Southern Surety Company as surety, Bull Head Oil Company was substituted as principal in this obligation.

Please advise if this obligation has been discharged by the principal, and if Southern Surety Company as surety, is relieved from further liability in connection therewith. Thanking you I beg to remain,

Very truly yours,

HHW-EJH

O. A. Wells, Vice President.

Lease 27865 JFK-EM 2-16-15 Bond covering lease of Allie Daney, minor.

February 16, 1915.

Southern Surety Company,
% O. A. Wells, Vice President, Muskogee, Oklahoma.

Gentlemen: Receipt is acknowledged of your letter of the 12th instant in which you state that under date of January

29, 1914, the Southern Surety Company executed a bond as surety for T. H. Dunn and J. Robert Gillam as principals guaranteeing the payment of \$2,000.00 bonus under lease covering allotment of Allie Daney, minor, and you ask to be advised whether or not your company has been released from further obligations relative to the payment of said bonus.

In reply thereto you are respectfully advised it appears from the records of this office that under date of August 10, 1914, there was credited to this lessor's account the sum of \$2,000.00. It is therefore considered that the obligations of the surety company under the bond ceased on the date said bonus was received.

Very respectfully,

Dana H. Kelsey,
Supt. for the Five Civilized Tribes.

Field Lease Nos. 27965 27983 17081-14 FCJ-EP 3-20-1914
Encl.

Subject: Guardianship of Allie Daney, minor.

March 20, 1914.

Mr. S. A. Mills, Field Clerk,
Ardmore, Oklahoma.

Sir: I enclose herewith letter of March 16, 1914, from Probate Attorney Moore, relative to the Allie Daney case, which is self explanatory.

I believe parties to the lease controversy verbally agreed to this question of guardianship being finally adjusted in the courts and I wish you would consult with Mr. Moore and the lessees, Messrs. Mullen, Dunn and Gillam, and advise the office as to the present status of the matter.

Respectfully,

Dana H. Kelsey,
United States Indian Superintendent.

Copy to Mr. J. B. Moore.

Lease 27983 SWW-GB 3/24/14

Subject: Lease of Allie Daney.

Register.

March 24, 1914.

Mr. G. G. McVay, Field Clerk,
Poteau, Oklahoma.

Sir: There is enclosed lease in quintuplicate entered into between J. J. Eaves, curator of Allie Daney, minor, in favor of J. S. Mullen, Ardmore, Oklahoma, covering 130 acres of the allotment of the lessor, which you are to retain in your

custody for a reasonable length of time, within which the lessees may procure the signature thereto of A. N. Thomas, also guardian of this minor.

This is in pursuance of the compromise agreement between the contesting lessees; and the papers should also be retained for a reasonable length of time, within which the approval of the court to the action of the guardian executing the lease may be secured.

Respectfully,

Dana H. Kelsey,

United States Indian Superintendent.

CC to Messrs. Campbell & Beall, Muskogee, Oklahoma.

(Copy) Received Union Agency May 14, 1914 No. 28787

Department of the Interior.

United States Indian Service,

Local Field Representative of the Union Agency.

Field 20215—14 17081—14 20292—14 Leases 27965-27983

Ardmore, Oklahoma, April 29, 1914.

Subject: Allie Daney, minor.

Hon. Dana H. Kelsey,

United States Indian Sup't., Muskogee, Oklahoma.

Sir: Receipt is acknowledged of your letter of the 27th of April, 1914, in re above subject, and in reply will state that the matter as now existing is in *statu quo*, as it appears that Solomon Daney, the protesting parent, and family have removed from this jurisdiction back into the jurisdiction of the LeFlore County Court where the original appointment of guardianship has been and is now existing. The matter of the curatorship pending in Love County, which was attacked and which was transferred to this county upon application of the parent of said minor, said parent having moved into this jurisdiction, and no sooner had the curatorship been moved here so as to get action, than he moved back to LeFlore County. Since such removal I have called upon Mr. Moore Probate Attorney to appear in this court and have the curatorship now existing properly extinguished, thereby leaving the guardianship existing in LeFlore County to retain and exercise sole and full guardianship of both the person and estate, LeFlore County, now being without question, the proper venue.

Respectfully,

SAM/A

S. A. Mills, Field Clerk.

Received Union Agency May 11, 1914 No. 3021

May 8, 1914.

Mr. Dana H. Kelsey,

U. S. Indian Superintendent, Muskogee, Oklahoma.

Dear Sir: In re: The Guardianship of Allie Daney, a minor.

Some few days ago Mr. Atha N. Thomas of this city and who is the legal guardian of the above named minor, received a letter from you asking him to have an old curator appointment which is now pending at Ardmore, Oklahoma, of which J. J. Eaves is curator, transferred to LeFlore County.

As Mr. Thomas' attorney I have just made a trip to Ardmore and consulted Mr. Eaves attorney and he assured me that he would have the case transferred to LeFlore County in a very few days.

Yours very truly,

In re assignment of lease

J. B. Harper.

Received Union Agency Jun 16 1914 Enclosure No. 38321
Lease 27983

Subject: Allie Daney lease.

Poteau, Oklahoma, June 13-1914.
Register.

Hon. Dana H. Kelsey,

United States Indian Superintendent, Muskogee, Oklahoma.

Sir: Referring to your communication of March 24-1914 there is returned herewith the oil and gas lease covering land of Allie Daney. It is believed that this lease has been held in this office a reasonable length of time.

Respectfully,

GGM-NWS

S. A. Mills, Field Clerk.

Copy Rec'd Union Agency Jan. 24-14 Encl. 4770
Lease No. 27965 Refer to H-S

Report in regard to the adequacy of bonus—allotment of
Allie Daney. January 24, 1914.

With reference to the adequacy of bonus upon the following oil and gas mining lease No. 27965, Allie Daney, minor, by A. N. Thomas, guardian, Talihina, Oklahoma, to T. H. Dunn and Robert Gillam, Ardmore, Oklahoma, covering the

S2 NW SW and the W2 SW SW of Section 4, Township
4S., Range 3W.,

dated August 19, 1913, forty acres, bonus \$70.00, I beg leave

to report that upon an investigation of the bonus values in this particular district upon the date of execution of this lease, as determined by the presumed capacity of a well brought in upon the Apple Franklin land in the

SE4 NW NE of Section 8-4-3,

August 7, 1913, I find varying sums paid for acreage ranging from \$1.00 to as high as \$10.00 per acre.

Taking into consideration all the facts, I am of the opinion that a bonus of \$70.00 upon August 19, 1913, was inadequate. The present stage of development on tracts adjoining this lease calls for prompt drilling upon the same in order to properly protect the interest of said minor. I therefore advise that it is to the best interests of the minor that in lieu of further cash bonus, there should be required a bonus consideration in the total sum of \$2,000.00 to be taken out of the first oil produced from this lease, said sum to be paid in monthly installments at the rate of 25 per cent of the gross monthly runs, exclusive of the royalty interest, until the entire amount is remitted to the United States Indian Agent, to the credit of said minor, and I so recommend.

United States Oil Inspector.

Poteau, Okla., Sept. 19, 1913.

Hon. Dana H. Kelsey,
Muskogee, Okla.

Dear Sir: I write you for whatever assistance your department may be able to give me in regard to several guardian and curatorships existing in the Chickasaw Nation over estates of full-blood minors living in Leflore County, and more especially in regard to J. J. Eaves (who seems to have been a handly man for Mullens & Mullens of Ardmore), over the estate of Allie Daney, which is now pending in Love County. A. N. Thomas, of Talihina, is guardian for this child in this county, and is unable to collect any rents out of Mullens, and I want to know if Eaves is still collecting the rents on this land. My records show that Eaves was appointed in a number of counties for minors living in this county, leased the land to Mullens, and the children who have other guardians in this county, are receiving no rentals. Any assistance that you can give me in seeing that these children get their rents, will be appreciated.

Yours truly,

(Signed) F. C. Bulger,
Co. Judge Leflore Co.

(G. G. Adkins, Register of Deeds.)

Received Union Agency, Sep. 18, 1913. No. 50540.
Dry Goods,
Ladies' Apparel,
Furnishing Goods,
Clothing, Shoes,
Groceries.

A. N. Thomas & Company,
"Best place to trade."

Talihina, Oklahoma, Sept. 16/1913.

Hon. Dana H. Kelsey,
Muskegee, Oklahoma.

Dear Sir: Something over 1 month ago, I gave a lease to Dunn & Gillam, of Ardmore, Okla., as Gdn. of Allie Daney of this place, and since then J. J. Eaves, of Ardmore, one of the Mullins men, comes up with a claim that he is curator of the same child and gave them a lease. Mr. Eaves, it seems, has never paid any attention to the child until this came up. He has never made any reports, or looked after the child at all. He was never known until this matter came up. The child has always lived here, and I have had charge of her since my appointment as her guardian. Her father was guardian over her until he asked for me to be appointed, and never knew of there ever being a curator appointed. I would like to have your assistance in this matter. Thanking you very much for looking into this matter, I am,

Very truly,

Atha N. Thomas.

P. S. The county judge here approved the lease that I made Dunn & Gillam.

27965—Allie Daney to Dunn & Gillam.

27983—Allie Daney to J. S. Mullen, both pending here.

Received Union Agency, Oct. 16, 1913. Enclosure No. 55541.

Department of the Interior,
United States Indian Service, Union Agency,
Muskegee, Oklahoma.

In re Oil and Gas Lease,
Rem. B 7578.
Allie Daney, N. B. Choctaw, 1365.

Protest of T. H. Dunn and J. Robert Gillam.

Come now T. H. Dunn and J. Robert Gillam, lessees, and protest the pretended lease executed by J. J. Eaves, as curator of the estate of Allie Daney, minor, on the 19th day of August, 1913, to J. S. Mullen for the following reasons, to-wit:

1st. Because said J. J. Eaves was not the legal guardian of the person or estate of said Allie Daney, nor, had he ever exercised any such authority over the person or estate of said Allie Daney prior to the execution of said lease, nor was he legally qualified to so act at the time he executed the same.

2nd. Because the County Court of Love County was not the proper court to approve and confirm said lease, nor had said court jurisdiction over the person or estate of said minor at the time said pretended lease was approved.

3rd. Because said pretended lease was executed without notice to, nor authority from nor consent of the said Allie Daney, her father, Solomon Daney, or her legally constituted guardian, Otha N. Thomas, of LeFlore County, Oklahoma.

4th. Because the said J. J. Eaves is a professional curator for the said J. S. Mullen, self-serving and appointed upon his own application at the instance of said Mullen, in order that said Mullen may exploit the lands of said Allie Daney at a nominal rental to the detriment of said minor, and not for its use and benefit, which said pretended authority is in fraud of the rights of said minor and in defiance of the laws controlling guardians and wards in Oklahoma.

5th. Because said lands of said minor are about to be drained of the oil in or under the same by reason of the fact that several wells are now drilling adjacent thereto and locations have been made for others, and unless some action is taken by said Department at once, the interest of said minor will suffer serious damages.

Statement of Facts.

On the 19th day of August, 1913, protestants were granted an oil and gas lease by A. N. Thomas, the legal guardian of Allie Daney, a full-blood Choctaw Indian, upon the south half of the northwest quarter of the southwest quarter, and the west half of the southwest of the southwest of section four, township four south and range three west of the Indian Base and Meridian, and the same was duly approved by the County Court of LeFlore County. Said county being the county within the boundaries of which said minor and its family had resided since birth of said Allie Daney. See Exhibits "A," "B" and "C." Upon the same date a petition was filed in the County Court of Love County by one J. J. Eaves representing himself as guardian of the said Allie Daney.

Upon the petition said county judge made an order as requested which by mistake bears date of the day before said petition was filed. Upon the 23rd day of August, 1913, Solomon Daney, the father of the minor, executed an affidavit and

application for the removal of said cause to LeFlore County, and upon the 11th day of October, 1913, there was filed in said court a motion verified by affidavit of Solomon Daney to withdraw the application to remove the case to Carter County, Oklahoma, and it appearing that he had been induced by J. S. Mullen to move to Carter County in consideration of said Mullen furnishing him a home and a tract of land to farm out of his wife's allotment which said Mullens had leased for a term of years. Upon the 13th day of October, after hearing the cause, the court made an order removing said proceedings to LeFlore County, Oklahoma. Both leases approved by different courts upon the same day are now presented for your approval. Which of said leases shall be recommended for approval by the Secretary of the Interior. The appointment and qualification of A. N. Thomas since statehood in LeFlore County, as shown by the exhibits, was regular and valid under the laws of Oklahoma, all the requisites of jurisdiction and procedure as required by the laws of Oklahoma having been complied with.

1st. Was the appointment of J. J. Eaves as curator by the United States Court sitting at Pauls Valley regular and valid under the laws then in force? Mansfield's Digest, under the subject of Guardians, Curators and Wards (as adopted May 2, 1890, by Congress, and extended so as to include Indians and their estates by Sec. 2 of Act of Congress approved April 28, 1904), governs the legality of any appointment made prior to statehood. The father, if living, and if not, the mother, were the natural guardians of minors and their estates and required to give security only when the estate was not derived from such guardian. Appointments were made upon petition when the minor was under 14 years of age, signed by the next of kin or some person interested in its behalf. Sections 3465, 3466, 3467. As shown by Exhibit "D" the petition was signed by J. J. Eaves admittedly a total stranger, and interloper.

It will be admitted that the father was living at this time and was not imprisoned in the penitentiary, nor will it be urged that any justice of the peace, sheriff or constable apprehended this minor within the Southern District and brought it before the court, in fact the minor, as appears by the rolls, was a child only slightly over one year old and probably at its mother's breast in LeFlore County, Oklahoma over one hundred miles away, when this good Samaritan came all the way from Elk, Indian Territory, to Pauls Valley, to look after its interests. Sections 3468 to 3475, inclusive.

It is doubtful whether there had been any lands selected at the time of this application, certainly none which the father could not have looked after at the time. Under Section 3477,

the court was required to appoint the father unless upon notice to him he was found to be unfit.

Section 3489 requires a bond before the guardian enters upon his duties as such or a new bond upon the same conditions. Section 3492 requires additional security to be given within ten days after making the order.

Section 3462 provides for an appointment in vacation subject to the confirmation or rejection by the court. How many of these requirements have not been complied with will be shown by the transcript Exhibit "D."

1st. The application was not made by the next of kin, nor any other person interested in the minor.

2nd. No notice was given of the hearing on the appointment.

3rd. The appointment was never confirmed by the court.

4th. The bond appears to have been approved by the court and while a new bond was ordered, more than six years have elapsed and no bond was given.

5th. The minor lived with its parents in the Central District and never lived in the Southern District.

6th. J. J. Eaves never had the control nor possession of any of the minor's property nor person and never exercised any authority over either.

7th. The lease was executed without notice or authority.

8th. No order appears to have been made after statehood transferring the case from the United States Court to the Love County Court.

The Supreme Court of Oklahoma has not passed upon all these statutes, but it should be presumed when it does it will hold them all requisites of a valid appointment.

Upon the second objection, the Supreme Court of Oklahoma has held that a notice in the nature of a summons is necessary to a valid appointment, and that every prerequisite must appear upon the records and must not rest in parole. *Worsham v. John*, 98 P. 347.

That court has also held that the transfer to the County Court must be upon order of court. *Davis v. Camthers*, 97 Pac. 581.

That court has also held such appointment may be made at any court within the district where the minor resides. *Eaves v. Muller*, 107 Pac. 433. *Norton v. Miller*, 25 Ark. 108.

Many decisions hold that the giving of a bond is a prerequisite to any valid act on the part of a guardian. Wormer on Am. Law of Guardianship. *Murphy v. Superior et al.*, 84 Cal. 592 page 120, 33 L. R. A. 759, 24 Pac. 310.

In Arkansas by a statute a prerequisite to a valid appointment is the giving of a bond approved by the court, and it has been so held by the Supreme Court of that state—Sections 6532 and 6534. *Mont. D. Gwynn v. McCauley*, 32 Ark. 97.

The father, unless unfit and so found to be unfit by the court, is entitled to the appointment as guardian. *Bowles v. Dixon*, 32 Ark. 92. *State v. Grisby*, 38 Ark. 406.

The validity upon a collateral attack of an appointment made by the clerk in vacation is discussed in the case of *Shumond v. Phillips*, 53 Ark. 37.

Section 20 of the Act of April 26, 1906, and Secs. 2 and 20 of the Act of Congress of May 27, 1908, and Sections 9, 11 and 12 of the Rules and Regulations promulgated June 20, 1908 (No. 140) all provide that oil and gas leases must be approved by the proper court having jurisdiction. The amendment to these rules of July 23, 1910, requires the payment of rentals and royalties to be upon vouchers approved by the proper court having jurisdiction.

Aside from these considerations, the Secretary may approve or disapprove any lease presented, and his action cannot be controlled by any court and it would seem under the circumstances of this case when the father and child live in LeFlore County and are assenting to the lease executed by the guardian in that county, that the Secretary would consider their wishes in preference to the lease executed by an interloper and stranger who has never contributed to them in any sum from such income already derived by him from the use of these lands. Upon the foregoing considerations we ask that the lease to J. S. Mullen be disapproved and the lease to Dunn and Gillam approved.

2nd. Because said County Court of Love County had no jurisdiction over the person nor estate of said minor.

Exhibits "A," "B" and "C" show that this minor resided in LeFlore County. Exhibit "C" shows that a guardianship had been pending in said county since statehood, and that while Allie Daney had owned land in Love County, yet that Solomon Daney had sold in 1908 all of the land in Love County to one W. B. Dennis through the County Court of LeFlore County. Whatever may be the character of property, such as an oil lease, that court could have had no jurisdiction to make a valid sale of it without having jurisdiction either over the property or the minor. Neither did said court have any jurisdiction over the pretended curator or guardian J. J. Eaves, nor was there at that time a bond to secure said minor for the proceeds of said sale of the mining lease to J. S. Mullen.

3rd. Said lease was approved without notice and the grant made to J. S. Mullen without notice of any character to the next of kind of the ward, and was therefore void. See Section 6558, Compiled Laws of 1910.

This Section requires notice to the next of kin or waiver of such notice before a sale can be made of any real or personal estate or any part of it. An oil lease is nothing more nor less than a contract concerning real estate the subject matter of which is the sale of the oil and gas in or under the land when produced for a portion of the proceeds and an additional bonus.

4th. The Department by reason of the statute and Acts of Congress are given special care and control over the lands of minor full-blood Indians. As it appears in the records of this case and is well known throughout the Southern District J. J. Eaves is but a figurehead for J. S. Mullen and used by him as a means of exploiting and controlling the land of not only Allie Daney but many other minors. The fact that since his appointment in the year 1905 that he has never dealt with any other person concerning those lands and that too at a nominal figure bears out this statement.

The fact that by his report J. S. Mullen has had possession of the said land since 1905 without contract of any kind approved by any court and the further fact that Mullen represents him in all matters, prepares his accounts, files them with the court, bears out the statement that when Mullens deals with Eaves he deals with himself. Curatorships of this character are valuable in that they be used to prevent the legally appointed guardian from interfering with Mullens in the exploitation of said lands. It also allows Mr. Mullens to use the lands without contract nor obligation to impair his credit.

5th. As shown by the plat marked Exhibit " " one well is now being drilled in within 200 feet of the south line of this tract of land. There is a producing well in the northeast quarter of section 8-4S-3W. and only a short distance from this land, and another well in the south east quarter of the south west quarter of section 5-4S-3W and two locations made in same section, one of which is in the quarter section adjoining this land on the west. The same person who is drilling the well in the NW/4 of NW/4 of section 9-4S-3W, is under contract to drill another well in the SE/4 of the SE/4 of the SW/4 of section 4 adjoining this land, and other locations are shown by the plat. These wells may be drilled in within two weeks' time on account of the easy drilling. The well in section 8 was drilled in in twelve days.

It will thus be seen that if the parties are left to the delays by that may be occasioned by court proceedings the oil

in and under this lease may be drained before a final determination has been reached. For the foregoing reasons we respectfully submit that the lease to J. S. Mullen has no foundation in law and its approval would be against the interest of the said minor. The approval of the lease to Dunn & Gilham would preserve the property and result in an early development of the same.

Respectfully submitted,

L. S. Dolman.

Received Union Agency Nov 14 1913 No. 61009

Latham, Semple & Tucker
Attorneys at Law
McAlester, Oklahoma

Tribal and Probate Attorneys for Choctaw Nation.

November 13, 1913.

Subject: In re allotment of Allie Daney.

Hon. Dana H. Kelsey,

U. S. Indian Superintendent, Muskogee, Oklahoma.

Sir: We have a letter from S. A. Mills, Field Clerk, at Ardmore, Oklahoma, advising us that, on October 14, 1913, he made a detailed report in the case of A. N. Thomas guardian of Allie Daney.

Mr. Thomas has asked us to take up this matter for him, and we will thank you to kindly send us all of the papers in the case.

Respectfully,

Latham, Semple & Tucker.

Received Union Agency Dec 10 1913 No. 65619

L. S. Dolman
Attorney at Law

Ardmore, Oklahoma, Dec. 9, 1913.

Hon. Dana H. Kelsey,

U. S. Indian Superintendent, Muskogee, Oklahoma.

Dear Sir: A copy of your letter dated December 5, to J. S. Mullen, in regard to the hearing in the Allie Daney lease controversy, was received by me, and it was agreed to meet at your office on next Saturday, the 13th of December, at 10 o'clock, and take the matter. I will be present with my clients.

Mr. Mullen asked me to agree upon a statement of facts, but this seems to me to be useless, because the facts in the case are represented by affidavits and transcripts of proceedings,

now pending in the case and attached to my brief. We do not care to recognize Mr. Jake Hamon in the matter at all, as we contend that he has no standing whatever, either on his appeal to the District Court of LeFlore County, or before the Department. There has been considerable maneuvering in this case for advantage by both parties, and each seems to want the "lion's share" and I cannot see where anything can be gained by compromise, either for the Department or for ourselves.

Yours very truly,

L. S. Dolman.

(Copy) Received Union Agency Dec 23 1913 No. 68097

Department of the Interior
United States Indian Service
Union Agency, Five Civilized Tribes.

Leases Nos. 27983-27965 OUB-AFS

Subject: Report in re adequacy of bonus and drainage of the allotment of Allie Daney.

Muskogee, Oklahoma, Dec. 22, 1913.

Hon. Dana H. Kelsey,

United States Supt., Muskogee, Oklahoma.

Sir: With reference to the bonus consideration on oil and gas mining lease upon a portion of the allotment of Allie Daney, described as

S2 NW4 SW4 and W2 SW4 SW4 Sec. 4, T. 4S., R. 3W., as of date August 19, 1913, I beg leave to report that I have made a personal inspection of this tract of land and an examination of the records as to the chronological order of oil development in this part of the country. I find that the drilling of an oil well upon the Apple and Franklin land, the SE4 NW4 NE4 Sec. 8-4-3, was first begun upon July 20, 1913, was on top of the sand August 6th, and was drilled in at 950 feet August 7, 1913. This land is located a little more than a quarter of a mile southwest of this tract and is the principal factor having a material bearing upon the bonus value of this lease. The discovery well made several flows and all indications at that time were such as to lead one to conclude that at a very conservative estimate it had a capacity of 100 barrels daily, and although at the time this lease was executed the real capacity of the well was not ascertainable, the conditions surrounding this discovery and subsequent work thereon were extremely promising for a splendid producer, so that the lease executed upon the date mentioned above would undoubtedly command a substantial sum as a bonus consideration.

In view of these facts, I am of the opinion the lease was worth \$100.00 per acre, or \$4,000.00 upon the date of its execution and I so recommend.

With reference to the drainage, will say that a producing well of over 100 barrels capacity per day was drilled in by the Humble Oil Company November 9, 1913, in the NW4 NW4 NW4 of Sec. 9, T. 4S., R. 3W., on the south line of this minor's land, and another location has been made directly east upon the south line of this tract in the NE4 NW4 NW4 of Sec 9-4-3, which will probably be completed by Jan. 15th. There are three 250 bbl. tanks on the 30-acre lease of the Oil Company and one 1600 bbl. tank building. The three tanks are full of oil and there is about another tank in an earthen reservoir, making approximately 1,000 bbls. of oil in storage. The well has been tubed with 2 inch and throttled down, awaiting completion of the 1600 bbl. tank. Mr. Goddard, the field superintendent of the lease, informed me that he expected to turn the well into this tank upon the following day, December 18th. None of the oil has as yet been removed from the premises. It will be a question of a few days only until the well will be operated continuously to its full capacity, and will be drawing oil from beneath the said minor's land.

In view of these facts, I advise that in order to properly protect the interests of this minor, operations should be begun upon her lease in the shortest possible time.

Respectfully,

O. U. Bradley,
United States Oil Inspector.

Received Union Agency Jan 14 1914 No. 2449

L. S. Dolman
Attorney at Law
Ardmore, Oklahoma.

January 12, 1914.

Subject: Allotment of Allie Daney.

Hon. Dana H. Kelsey,

United States Indian Superintendent, Muskogee, Oklahoma.

Dear Sir: In answer to your letter of January 9th, with reference to the forty acres of the Allie Daney allotment, upon which we have made application to lease, and upon which settlement was pending, will say that we presume that the letter stating that a bonus of \$100.00 per acre, or \$4000.00, was inadvertently mailed out of your office in your absence, and will say further that such a bonus as stated would be impossible, as our Mr. Dunn stated to you in the office of Mr. Mills,

and if insisted on, will result in further negotiations between Mr. Mullen and ourselves, and, in all probability, defeat a settlement and thus prevent the immediate development of this minor's land.

The facts surrounding the taking of this lease, and the conditions existing at the time, the bonus placed upon other leases at that time, and the amount paid for commercial leases, does not warrant a very large bonus upon this land. To substantiate this statement, you will find in your own records full-blood leases taken in this immediate vicinity, and some in this same section, and approved by the Department, did not exceed twenty-five cents per acre bonus. In other words, you saw fit to add ten cents per acre to the usual fifteen cents per acre advance royalty, as an additional bonus upon other full-blood leases. The records of the Register of Deeds of Carter County will show that commercial leases in that immediate vicinity were bringing no better prices at the time this lease was taken. Please make a note of the fact that our lease was executed on August 19, 1913, and at that time very few full-blood leases had been taken north and northeast of the well. This well, as will be found upon investigation, in section 8, is southwest of this land almost a half mile, and no locations had been made by anybody north and northeast of the well in section 8, nor were any made for some time thereafter. Everybody was making their locations and purchases south and west of section 8, believing that section 8 was the northern limit of the field.

The examination for the purpose of placing a bonus upon this land was made in December, four months after the lease was taken, at which time development had all been made north and five or six wells had been brought in to the north, whereas, the southern part of the field had been condemned. No doubt the production at the Humble well in section 9 at the time made his inspection, influenced your inspector in placing the bonus he did upon this land. This well, however, was not brought in until some time in November.

The off-set wells heretofore drilled to the largest wells in the field, including the Humble well, have proven very disappointing. Since you were here, an off-set well to the one in section 8 has been brought in dry. No doubt this field is very similar to the Wheeler field; inclined to be in pockets and of no great extent.

Mr. Mullen himself, on August 14, 1913, sold a lease on lands in section 4, the same section, for one dollar bonus and one-eighth royalty, and this is not disproportionate to other commercial leases made at about the same time in that locality.

In view of these facts, we respectfully request that you refer this matter back to your oil inspector that he may place a reasonable bonus upon this land as of August 19, the date this lease was executed. We also ask that this matter be given immediate attention, if possible, in view of the fact that the information of the inspector has halted the details of this settlement and compromise, and we are very anxious to know what bonus the Department will place upon this land before we go any further in the matter.

Respectfully,

L. S. Dolman.

(Note: As a part of the Exhibits to Kelsey's deposition appears his letter of January 31, 1914, to the Commissioner of Indian Affairs, which has been introduced in evidence as plaintiff's Exhibit 15, and therefore to save cost, is omitted at this place.)

(Copy) Lease 27983 SSW-MGB 6/27/14 Enclosure
Subject: Lease of Allie Daney, minor. Disapproval.

June 27, 1914.

The Honorable Commissioner of Indian Affairs.

Sir: There is respectfully transmitted herewith for consideration an oil and gas mining lease executed by Allie Daney, minor, by her curator, J. J. Eaves, described as follows:

No. 27983 to J. S. Mullen, lessees, dated August 18, 1913, filed August 23, 1913, containing 130 acres. 12½% royalty. Approved collective bond—Equitable Surety Company, surety. \$19.50 advance royalty held by Cashier, credited 8-23-13. \$13.00 bonus paid lessor.

Forty acres of the land covered by this lease was also covered by lease No. 27965, executed by A. N. Thomas as guardian of this allottee, and later joined in by J. J. Eaves, curator, in favor of T. H. Dunn and J. R. Gillam, which lease was forwarded to the Department on January 31, 1914, and approved February 3, 1914, in accordance with a compromise agreement between the conflicting lessees. The records will show that the controversy arose from a case of conflicting guardians, and the forty acres being situated in the heart of the Healdton oil field, it was necessary that the compromise be effected in order to protect the interests of the lessor, whose land was in danger of being drained of oil. The lease referred to which was approved, was executed by both guardian and curator and received approval by the County Courts of Love and LeFlore Counties. In so far as the forty acres in controversy were concerned, Mr. Mullen, the lessee in lease No.

27983, heretofore requested that his lease be disapproved. This request was in pursuance of the original agreement had between the parties.

On account of the doubtful validity of the lease now transmitted for consideration the proper court not having passed upon the matter of guardianship, Mr. Mullen requested that his lease be withheld a sufficient length of time to enable him to induce A. N. Thomas, guardian in LeFlore County, to also enter into its execution. Had guardian also joined in the lease, its validity could not have been questioned, and it could have been approved as to the land not contained in the lease of Dunn and Gillam.

On March 24, 1914, all parts of the lease were forwarded to Field Clerk McVay, at Poteau, Oklahoma, with request that he retain same in his custody for a reasonable length of time, within which the lessee might procure the execution of the lease by Mr. Thomas. Mr. Mullen was notified that the lease was in the office of Field Clerk McVay, and that it would be proper for him to secure the signature of A. N. Thomas there-to, if he so desired. I am informed by Messrs. Campbell and Beall, attorneys for Mr. Mullen, that the latter took steps to have Mr. Thomas enter into the execution of the lease, but his plans did not materialize, the lease remaining in its former state.

On June 16, 1914, Field Clerk McVay returned the parts of the lease to this office. Attorneys for Mr. Mullen were notified at once that the lease had been returned, and they were requested to take some action with a view of disposing of the case.

On June 22, 1914, Mr. Mullen, by his attorneys, Campbell and Beall, notified this office that he desired the lease disapproved in its entirety.

Inasmuch as the matter of guardianship has not been determined by the courts, and this lease having been executed by only one of the guardians, or curators, it is very doubtful that if same were approved it would convey any title to the lessee. Consequently I believe it to be to the best interests of the lessor that the lease be disapproved, according to the request of Mr. Mullen, and I respectfully recommend that this action be taken.

It is further recommended that W. M. Baker, Cashier, be authorized to return to J. S. Mullen the sum of \$19.50, which represents advance royalty paid into this office by him under this lease.

Respectfully,

Dana H. Kelsey,
United States Indian Superintendent.

Jun 29 1918

Office of Superintendent for the Five Civilized Tribes,
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of papers in the Alley Daney lease.

Gabe E. Parker,

Superintendent for the Five Civilized Tribes.

Jun 29 1918 (Seal)

Department of the Interior
Office of Indian Affairs.

Washington,, 191

I. E. B. Merritt, Assistant Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear on file in this office.

In testimony whereof, I have hereunto subscribed by name, and caused the seal of this office to be affixed, on the day and year first above written.

(Seal) E. B. Merritt, Assistant Commissioner.

The above constitute the exhibits to deposition of Dana H. Kelsey.

Defendants' Other Exhibits.

Petition of J. J. Eaves to Lease for Oil and Gas.

State of Oklahoma, County of Love. In the County Court.

In the matter of the guardianship of Allie Daney, a minor.
J. J. Eaves, guardian.

Comes now J. J. Eaves guardian of Allie Daney, a minor, and petitions the court that his ward is a full-blood Choctaw, enrolled opposite No. . . . and that his said ward is the owner of the following described land situated in the County of Carter and Stephens, to-wit:

S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ and W $\frac{1}{2}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 4, Township 4 South, Range 3 West, and W $\frac{1}{2}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$ and NW $\frac{1}{4}$ of SE $\frac{1}{4}$ and N $\frac{1}{2}$ of SW $\frac{1}{4}$ of SE $\frac{1}{4}$ and NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 19, Township 1 South, Range 5 West.

That your petitioner is desirous of entering into an oil and gas lease on said lands with J. S. Mullen, of Ardmore,

Oklahoma, in accordance with the rules and regulations of the Department of the Interior. That he believes it to be to the best interest of his ward that said lands be so leased.

Wherefore he prays an order of the court authorizing him to execute said lease.

J. J. Eaves, Petitioner.

Filed August 19, 1913. J. H. Hays, County Judge.

State of Oklahoma, County of Love. In the County Court.

In the Matter of the guardianship of Allie Daney, a minor.
J. J. Eaves, Guardian.

Order.

Now on this 18th day of August, 1913, there came on for hearing the petition of J. J. Eaves, guardian of Allie Daney, a minor, for authority to execute an oil and gas lease to J. S. Mullen, of Ardmore, Oklahoma, on the land of said minor described as follows:

S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ and W $\frac{1}{2}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 4, Township 4 South, Range 3 West and W $\frac{1}{2}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$ and NW $\frac{1}{4}$ of SE $\frac{1}{4}$ and N $\frac{1}{2}$ of SW $\frac{1}{4}$ of SE $\frac{1}{4}$ and NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 19, Township 1 South, Range 5 West.

And it appearing to the court that it will be to the best interest of said ward that such lease contract be entered into and said land prospected for oil and gas,

It is therefore ordered by the court, that said guardian be and is hereby authorized and directed to enter into an oil and gas lease with J. S. Mullen on the above described land, said lease to be in accordance with the rules and regulations of the Department of the Interior.

J. H. Hays, County Judge.

State of Oklahoma, County of Love. In the County Court.

In the Matter of the Guardianship of Allie Daney, a minor. J. J. Eaves.

Comes now J. J. Eaves, guardian of *J. J. Eaves*, a minor, and represents to the court, that in accordance with the order of this court heretofore made herein, your guardian herein leased to J. S. Mullen, of Ardmore, Oklahoma, for oil and gas purposes, the following described lands, to-wit:

S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ and W $\frac{1}{2}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 4, Township 4 South, Range 3 West and W $\frac{1}{2}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$ and NW $\frac{1}{4}$ of SE $\frac{1}{4}$ and N $\frac{1}{2}$ of SW $\frac{1}{4}$ of SE $\frac{1}{4}$ and NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 19, Township 1 South, Range 5 West.

Your guardian further represents that said oil and gas lease was made on the 18th day of August, 1913, and is in accordance with the rules and regulations of the Department of the Interior, and that in addition to the royalty demanded to be paid by the Government to the Indian, that he received \$10.00 as an additional consideration, which considerations your petitioner says are fair and reasonable considerations.

Wherefore, your petitioner prays that this court approve, confirm and ratify said oil and gas lease hereinbefore referred to in all things.

J. J. Eaves, Guardian.

Filed August 19, 1913. J. H. Hays, County Judge.

Filed in District Court, October 20, 1913. W. L. Richards, District Clerk.

In the Matter of the Guardianship of Allie Daney, minor.
J. J. Eaves, Guardian or Curator.

Now on this the 11th day of October, 1913, it being shown to the court the date August 18, 1913, in an order made by this court approving an oil and gas lease made by J. J. Eaves as Curator or Guardian, to J. S. Mullen, is an error as to said date, and that said oil and gas lease was approved on the 19th day of August, 1913.

It is therefore ordered, adjudged and decreed that *that* a nunc pro tunc order be entered correcting said error and that the record be made to read that the oil and gas lease was approved on August 19th, 1913.

J. H. Hays, County Judge.

Filed October 11, 1913. J. H. Hays, County Judge. By Ona English, Clerk.

State of Oklahoma, County of LeFlore.

I hereby certify the foregoing to be a true copy of a portion of a transcript from the County Court of Carter County, Oklahoma, filed in the County Court of LeFlore County, Oklahoma, at Talihina, on September 24, 1914.

Witness my hand and seal of County Court of LeFlore County, Oklahoma, at Talihina, this October 11, 1919.

H. S. Pilgreen, Court Clerk.

(Seal)

By W. L. Emmert, Deputy.

Defendants' Exhibit

Department of the Interior
Office of Indian Affairs

Washington, Jan. 22, 1919.

I, C. F. Hauke, Acting Assistant Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true copy of the original as the same appears on file in this office.

In Testimony Whereof, I have hereunto subscribed my name, and caused the *sale* of this office to be affixed, on the day and year first above written.

Seal

C. F. Hauke,
Acting Assistant Commissioner.

Received Union Agency Aug 23, 1913. Enclosure No. 45704.

Received Union Agency Jun. 16, 1914. Enclosure No. 38334.

Original 27983. Form A: Series 1908.—Approved April 20, 1908. Amended February 6, and June 29, 1911.

Oil and Gas Mining Lease Upon Land Selected for Allotment.
Choctaw and Chickasaw Nation, Oklahoma.

(Illegible stamp J 1914, 75437)

This indenture of lease, made and entered into in quadruplicate on this 18 day of August, A. D. 1913, by and between J. J. Eaves, curator of Allie Daney, a minor, of Pooleville, Okla., enrolled as a full-blood citizen of the Choctaw Nation, Roll No. 1365 New Born, party of the first part, hereinafter designated as lessor, and J. S. Mullen, of Ardmore, Okla., party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the Act of Congress approved May 27, 1908 (36 Stat. L. P. 312) witnesseth:

1. The lessor, for and in consideration of one dollar, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations, and conditions hereinafter contained, and hereby agreed to be paid, observed, and performed by the lessee, does hereby demise, grant, lease and let unto the lessee, for the term of ten years from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities, all the oil deposits and natural gas in or under the following described tract of land, lying and being within the County of Carter and Stephens, and State of Oklahoma, to-wit: The S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ & W $\frac{1}{2}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 4, Tp. 4 S. R. 3 W & W $\frac{1}{2}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$ & NW $\frac{1}{4}$ of SE $\frac{1}{4}$ & N $\frac{1}{2}$ of

SW $\frac{1}{2}$ of SE $\frac{1}{4}$ and NW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 1 Tp 1 S R 5 W of Section . . Township . ., Range . ., of the Indian Meridian, and containing 130 acres, more or less, with the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil and natural gas, also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

(Note: Paragraphs 2 to 13, inclusive, of this lease, are here omitted, as this lease is on the same Departmental form shown by Exhibit A to plaintiff's bill, and reference is here made to Paragraphs 2 to 13, inclusive, of Exhibit A to plaintiff's bill, as showing the paragraphs in this lease.)

In witness whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

Attest: J. J. Eaves, Gdn. Curator.
..... Allie Daney (Seal)
..... J. S. Mullen (Seal)

Two witnesses to execution by lessor: F. M. Adams, P. O. Ardmore, Okla.; R. S. Gardenhire, P. O. Ardmore, Okla.

Two witnesses to execution by lessee: F. M. Adams, P. O. Ardmore, Okla.; R. S. Gardenhire, P. O. Ardmore, Okla.

State of Oklahoma, County of Carter, ss.

..... before me, F. M. Adams, a Notary Public in and for said county and state, on this 18 day of August, 1913, personally appeared J. J. Eaves, guardian or curator of Allie Daney, to me known to be the identical persons who executed the within and foregoing lease, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth. F. M. Adams, Notary Public. (Seal) My commission expires June 11, 1915.

Department of the Interior,
United States Indian Service, Union Agency,

Muskogee, Okla., Jun. 27, 1914.

The within lease is forwarded to the Commissioner of

Indian Affairs with recommendation that it be disapproved. See my report of even date.

Dana H. Kelsey,
United States Indian Superintendent.

Department of the Interior,
Office of Indian Affairs.

Washington, D. C., Jul. 9, 1914.

Respectfully submitted to the Secretary of the Interior, with recommendation that it be disapproved.

C. F. Hauke,
Commissioner.

Department of the Interior,

Washington, D. C., Jul. 14, 1914.

Disapproved.

Bo Sweeny,
Acting Secretary of the Interior.

Filed for record this 23rd day of August, 1913, at 4:30 o'clock P. M. Dana H. Kelsey, Supt. Union Agency. By James L. Granger, A. Cashier.

Advance royalty received \$24.50.

State of Oklahoma, County of Love. In the County Court.

In the matter of the guardianship of Allie Daney, a minor, J. J. Eaves, guardian.

On this 18th day of August, 1913, came on to be heard the petition of J. J. Eaves, guardian of Allie Daney, a minor, for an order approving a certain oil and gas lease intered into between your guardian herein, and J. S. Mullen, of Ardmore, Oklahoma, covering the following described lands, to-wit:

S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ and W $\frac{1}{2}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 4, Township 4 South, Range 3 West and W $\frac{1}{2}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$ and NW $\frac{1}{4}$ of SE $\frac{1}{4}$ and N $\frac{1}{2}$ of SW $\frac{1}{4}$ of SE $\frac{1}{4}$ and NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 19, Township 1 South, Range 5 West.

And the court being fully advised in the premises, and being of the opinion that said oil and gas lease above mentioned is fair and reasonable, and in accordance with the rules and regulations of the Department of the Interior, and that in addition to the royalty called for on the production of oil and gas, and that the guardian received \$10.00 additional, and the court being fully advised finds that said considerations are fair and reasonable.

The court further finds that by order dated 18th day of August, 1913, he authorized the guardian herein to lease said above described lands.

It is therefore ordered, adjudged and decreed by the court, that the oil and gas lease heretofore made, as described herein, be and the same is hereby in all things ratified, confirmed and approved.

J. H. Hays,
County Judge.

Filed August 19, 1913. J. H. Hays, County Judge.

The defendant Bull Head's Exhibit No. 6 is a copy of the Departmental oil and gas mining lease to J. W. Gladney on five acres in Section 4, Township 4 South, Range 3 West, contiguous to the Allie Daney forty acres and mentioned in the record as the five acres assigned to the Bull Head Oil Company; the J. W. Gladney lease is on the Departmental oil and gas mining form known as "Form A, Series 1908, approved April 20, 1908, amended February 6 and June 29, 1911," and was executed September 13, 1913, "for the term of ten years from the date of the approval by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities;" the Gladney lease was approved by the Secretary of the Interior on November 20, 1913; on January 28, 1914, J. W. Gladney assigned said lease to the Bull Head Oil Company subject to the approval of the Secretary of the Interior and the Bull Head Oil Company accepted said assignment on the 28th day of January, 1914, and the Secretary of the Interior approved the assignment on April 7, 1914.

Defendants introduce the following Exhibits in addition to those attached to the deposition of Dana H. Kelsey:

Defendant's Exhibit No. 11 is a transcript of the record in No. 2181, in the District Court of Carter County, Oklahoma, styled, "A. M. Funkhouser, et al., v. E. A. McGowan, defendant." To shorten the transcript certain portions are omitted from this record.

On February 16, 1914, A. M. Funkhouser, J. Robert Gillam and T. H. Dunn filed their petition against E. A. McGowan in the above styled cause, which petition is as follows:

Defendant's Exhibit No. 11.

In the District Court Within and for Carter County, Oklahoma. A. M. Funkhouser, J. Robert Gillam and T. H. Dunn, Plaintiffs. vs. E. A. McGowan, Defendant.

Petition.

The plaintiffs say that on the ... day of, 1913, the plaintiffs and defendant entered into a contract whereby it was agreed that the plaintiffs were to procure a lease, in the name of J. Robert Gillam and T. H. Dunn, upon the following described lands:

known as the Allie Daney lease, said lands situated in Carter County. Said lease was to be taken for oil and gas, and was to be what is known as an oil and gas lease; that at the same time they agreed that a lease was to be taken for the same purposes, on the following described lands, situated in Jefferson and Carter Counties, to-wit:

and that said last lease was to be taken in the name of the defendant. It was understood and agreed that when the plaintiffs procured their lease and had it approved, that they were to give to the defendant a certain interest *interest*, and as soon as the lease was procured by the defendants, and approved by the Secretary of the Interior, he was to transfer to these plaintiffs a two-thirds (2/3) interest in the same.

The plaintiffs say that they procured their lease, as they agreed to do on the Allie Daney land, and gave to the defendant a writing showing just what interest he had in the same, according to said agreement, and the defendant was to give to these plaintiffs the same kind of a writing showing what interest these plaintiffs had in the lease he was to procure, but they say that the defendant did procure said lease, but now refuses to transfer the same to these plaintiffs, and is claiming that he is entitled to the whole of said lease. Said lands are described as follows:

The W2 of NW4 of NE4 of section 21; and S2 of S2 of SE4 of section 16, Township 4 South, Range 4 West, in Jefferson County, Oklahoma, and N2 of SW4 of NW4; and N2 of SE4 of NW4; and S2 of SW4 of NE4 of section 2, Township 4 South, Range 3 West, situate in Carter County, Oklahoma; that by reason of said contract and agreement, these plaintiffs are entitled to an undivided two-thirds (2/3) interest in and to said lease contract, and that said lease contract is worth at least twelve thousand dollars. They say they are informed that the defendant is attempting to sell and dispose of said lease, and will, unless prevented by the court, sell and dispose of the same, and convert the money to his own use, and that he, having the lease contract in his name, has attempted to transfer to one Fred A. Chapman, a portion of said land, and that the said Chapman has agreed to pay him the sum of \$6000.00 for a lease thereon, and they say that the defendant should be enjoined and restrained from transferring said

property, of the lease thereon, or any part thereof, until the rights of these parties can be determined, and that the said Chapman should be enjoined and restrained from paying said money, or any part thereof, over to the defendant, and they are informed that the said Chapman has given a check or checks for said money, upon the State National Bank, of Ardmore, and the said bank should be restrained from paying said checks, or any part thereof, until the rights of these parties can be determined; that this court has jurisdiction of this matter, as a portion of the land in controversy is situated in this county, and that the defendant is hopelessly and notoriously insolvent, and is not able to respond in damages, for any amount these plaintiffs may be able to recover from him; that they have no complete or adequate remedy at law, and unless prevented by the court, the defendant will dispose of the whole of said leases, and will wholly defeat these plaintiffs in their right to the same, and they will have no redress whatever, and that their injury and damages is irreparable and cannot be measured in dollars and cents.

Wherefore they pray for an order enjoining the defendant from disposing or attempting to dispose of any interest in said lease contracts; for an order restraining the said Chapman and the State National Bank from paying over to the defendant any moneys whatever, on account of said lease contracts, and that upon final hearing, that their rights to an undivided two-thirds (2/3) interest in and to said lease, be settled and be declared to be in them; for their costs and all other proper relief.

Cruce & Potter,
Attorneys for Plaintiffs.

State of Oklahoma, Carter County, ss.

A. M. Funkhouser, of lawful age, being duly sworn, upon oath says that he is one of the plaintiffs above named; that he has read the above and foregoing petition and known the contents thereon, and that the matters and things therein set forth are true, as he verily believes.

A. M. Funkhouser.

Subscribed and sworn to before me, on this the 16th day of February, 1914. Fred C. Ryburn, Notary Public. (Seal)
My commission expires March 1, 1917.

Endorsed on back: 2181 A. M. Funkhouser, et al., E. A. McGowan, Original petition. Filed February 16, 1914, at M. S. F. Haynie, Clerk District Court, Carter County, Oklahoma. Cruce & Potter, Attys.

In the District Court in and for Carter County, Oklahoma.
A. M. Funkhouser, et al., vs. E. A. McGowan.

Order Allowing Temporary Injunction.

Upon reading the petition of the plaintiffs filed herein it appearing to the court that the plaintiffs, upon the facts stated in said petition are entitled to the relief prayed for, it is *order* and adjudged that a temporary injunction be granted herein enjoining the defendant, his *his* agents and representatives from selling, assigning, transferring, or in any way disposing of or encumbering an oil and gas lease or leases, on the following described lands situated in Carter and Jefferson counties, Oklahoma, to-wit:

W $\frac{1}{2}$ of NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 21, and S $\frac{1}{2}$ of S $\frac{1}{2}$ of SE $\frac{1}{4}$ of Section 16, Township 4 South, Range 4 West, and N $\frac{1}{2}$ of SW $\frac{1}{4}$ of NW $\frac{1}{4}$, and N $\frac{1}{2}$ of SE $\frac{1}{4}$ of NW $\frac{1}{4}$, and S $\frac{1}{2}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 2, Township 4 South, Range 3 West.

It is further ordered that Chapmen or any one acting for him be enjoined from purchasing, or paying the defendant for any interest in said lease or leases, and that the State National Bank of Ardmore, Okla., be enjoined from paying any check of the said Chapman, to the said defendant, his agents, or representatives for any interest in said lease, or any moneys whatever on account of said lease contracts.

And it is further ordered that the 26th day of February, 1914, is hereby set as the time for hearing and determining said petition for injunction, at the District Court room in the City of Ardmore, Carter County, Okla., and that notice be given the defendant at least five days prior to said hearing, and that the plaintiffs give bond in the sum of One Thousand Dollars conditioned as required by law.

Witness my hand the 16th day of February, 1914.

Attest: S. H. Russell,
Judge of the District Court.

Endorsed on back: 2181, Order of Injunction. Filed Feb. 16, 1914, at M. S. F. Haynie, Clerk.

Praecept for summons was signed and filed and summons issued on the 16th day of February, 1914, and served on the day of February, 1914. The defendant, McGowan, filed a demurrer on March 4, 1914, on the ground that the petition did not state facts sufficient to constitute a cause of action and on the ground that the alleged contract was oral, not in writing, and, being an interest in land, was void under the statute of frauds.

Fred A. Chapman, made one of the defendants, filed a similar demurrer on March 17th, 1914; on the 10th day of April, 1914, defendant McGowan filed a motion to dissolve the injunction on various grounds not pertinent to this case. On April 24, 1914, Fred A. Chapman, one of the defendants, filed an answer, which, omitting the caption, is as follows, (with other proceedings):

Comes now the defendant, Fred A. Chapman, in the above styled and numbered cause and says:

First—That on the 16th day of February, 1914, an order was entered herein enjoining this defendant from paying the defendant E. A. McGowan any money for the lease or transfer on lands described in plaintiff's petition.

Second—That before said injunction was obtained he had already received the assignment of an oil and gas lease on the lands described in plaintiff's petition and had issued his negotiable check in the sum of Six Thousand (\$6,000.00) Dollars, payable to his co-defendant, E. A. McGowan, and delivered the same to him as a consideration for said lease before said injunction was procured and the said E. A. McGowan accepted the said check in full payment for said lease.

Third—That this defendant would further show that said injunction was wrongfully issued and that it was necessary to employ counsel to represent him in this litigation and owing to the importance of the litigation and the amount involved, a reasonable fee for the work done in representing this defendant is Two Hundred Fifty Dollars, which amount the plaintiffs are justly due this defendant for the wrongful issuance of said injunction.

Wherefore, premises considered, defendant prays that upon final hearing herein the said injunction be dissolved and that he have judgment against the plaintiffs in the said sum of Two Hundred Fifty Dollars for said attorney's fee, together with costs herein expended and for such other and further relief as he may show himself entitled to either in law or equity.

R. A. Hefner,
Attorney for Defendant, Fred A. Chapman.

Endorsed on back: #2181, E. A. McGowan vs. Funkhouser. Answer of deft. Fred A. Chapman. Filed Apr. 24, 1914, at ... o'clock .. M. S. F. Haynie, Clerk District Court Carter County, Oklahoma.

In the District Court of Carter County, State of Oklahoma,
A. M. Funkhouser, J. Robt. Gillam and T. H. Dunn,
Plaintiffs, vs. E. A. McGowan, Defendant.

Petition.

Now come the plaintiffs, J. Robert Gillam and T. H. Dunn, and show to the court that since the filing of this suit the plaintiff, A. M. Funkhouser has settled the same with the defendant, and asks that he be dismissed from this suit.

They say that the rights of these plaintiffs cannot be determined without the said A. M. Funkhouser is a party hereto and he having asked to be dismissed as party plaintiff, they ask permission of this court to make him a defendant herein, and ask that he be summoned to appear and show what disposition, if any, he had made of his interest in this controversy, and that upon final hearing, these plaintiffs have the relief prayed for in their original petition.

Wherefore, they pray that the said A. M. Funkhouser be made a party defendant herein; that he be served and required to answer, and upon final hearing, that all of the interests of these plaintiffs be protected, as prayed for in their petition, and for all other proper relief.

Cruce & Potter,
Attorneys for Plaintiffs.

Endorsed on back: 2181, A. M. Funkhouser, J. Robt. Gillam and T. H. Dunn, Plaintiffs, vs. E. A. McGowan, Defendant. Petition, Filed in open court, Apr. 27, 1914, at . . . o'clock . . . M. S. F. Haynie, Clerk District Court, Carter County, Oklahoma. Cruce & Potter, Attorneys for plaintiffs.

In the District Court of Carter County, State of Oklahoma,
A. M. Funkhouser, J. Robt. Gillam and T. H. Dunn, Plaintiffs, vs. E. A. McGowan, Defendant.

Petition.

Now come the plaintiffs, J. Robert Gillam and T. H. Dunn, and show to the court that since the filing of this suit the plaintiff A. M. Funkhouser has settled the same with the defendant as to himself and asks that he be dismissed from this suit.

They say that the rights of these plaintiffs cannot be determined without the said A. M. Funkhouser is a party hereto, and he having asked to be dismissed as party plaintiff, they ask permission of this court to make him a defendant herein, and ask that he be summoned to appear and show cause what disposition, if any, he had made of his interest in this controversy, and that upon final hearing, these plaintiffs have the relief prayed for in their original petition.

Wherefore, they pray that the said A. M. Funkhouser be made a party defendant herein; that he be served and re-

quired to answer, and upon final hearing, that all of the interests of these plaintiffs be protected, as prayed for in their petition, and for all other proper relief.

Cruce & Potter,
Attorneys for Plaintiffs.

Endorsed on back: 2181, A. M. Funkhouser, J. Robt. Gillam and T. H. Dunn, Plaintiffs, vs. E. A. McGowan, Defendant. Petition. Cruce & Potter, Attorneys for Plaintiffs.

In the District Court of Carter County, State of Oklahoma,
A. M. Funkhouser, J. Robt. Gillam and T. H. Dunn, Plaintiffs, vs. E. A. McGowan, Defendant.

Order.

On this day this cause coming on upon the application of Dunn & Gillam, to have the plaintiff, A. M. Funkhouser, made party defendant herein, and the court being sufficiently advised in the premises, is of the opinion that it is necessary that he be made a defendant.

It is therefore ordered that the said A. M. Funkhouser be and he is hereby made party defendant herein and summons is directed to be issued to be served upon him as directed by law, returnable May 5, 1914. To which deft. McGowan excepts.

A. Eddleman, Judge.

Endorsed on back: 2181, A. M. Funkhouser, J. Robert Gillam and T. H. Dunn, Plaintiffs, vs. E. A. McGowan, Defendant. Order. Filed in open court Apr. 27, 1914, at ... o'clock .. M., S. F. Haynie, Clerk District Court Carter County, Oklahoma.

Funkhouser was made a party defendant and service of process was had upon him.

In the District Court of Carter County, Oklahoma, A. M. Funkhouser, J. Robt. Gillam and T. H. Dunn, Plaintiffs, vs. E. A. McGowan, Defendant. 2181.

Order.

This cause is this day settled between the parties hereto, it being agreed that the plaintiffs shall dismiss this cause at plaintiffs' cost, and all matters of every kind growing out of this cause, including any damages that may have been sustained by the defendant, if any, by reason of the injunction, are hereby settled, and the garnishment proceedings herein and all moneys of every kind that have been garnished or stopped in payment by reason of the injunction herein is

hereby released, and the said defendant, E. A. McGowan, shall have the right to take down and collect all of said moneys.

Cruce & Potter,
Attorneys for Plaintiffs.
E. A. McGowan, Def.

Endorsed on back as follows: 2181, A. M. Funkhouser, J. Robt. Gillam and T. H. Dunn, Plaintiffs, vs. E. A. McGowan, Defendant. Order. Filed Apr. 30, 1914, at .. o'clock ... M., S. F. Haynie, Clerk District Court Carter County, Oklahoma.

Defendant's Exhibit No. 32.

(Envelope) Return in five days to A. N. Thomas & Co., Talihina, Okla. (Postmarked) Talihina—15 3 P. M., Okla. Two cent postage stamp. Mrs. A. M. Funkhouser, Box 100 A, R F D Fort Smith, Ark.

(Letter enclosed)

John J. Thomas

A. N. Thomas

A. N. Thomas & Company
"Best Place to Trade"

Dry Goods Ladies' Apparel Furnishing Goodss
Clothing, Shoes Groceries.

Talihina, Oklahoma, Sept. 15, 1915.

Mrs. A. M. Funkhouser,
Fort Smith, Ark.

Dear Madam: I wanted to get the address of the Man, who is sueing Dunn & Gillam, about some Bull Head Oil Stock. It seems that your late Husband had some kind of interest and that this person that he disposed of some to is having trouble with Dunn & Gillam.

Very truly,

(Signed) Atha N. Thomas.

Defendant's Exhibit 34.

In the Matter of the Guardianship of Allie Daney, a minor,
In County Court at Talihina, LeFlore County, Okla.

Comes your guardian here and makes known to the court that he entered into an oil and gas lease with Dunn & Gillam on 40 acres of land located in Carter County, August 13, 1913, and that said lease was approved by this court; that immediately thereafter Jake L. Hamon sought to set aside said lease, and appealed from the decision of the County Court to the District Court; that it became necessary to employ counsel; and then it developed that several years prior to the ap-

pointment of a guardian in this court that J. J. Eaves had been appointed curator in Carter County, and the curatorship was later moved to Love County, and then back to Carter County; and the said Hamon had an oil and gas lease approved in the curatorship case, although the curator had done nothing in the way of his trust in making reports or collecting rents; that your guardian had been looking after the estate for several years and had considerable moneys on hand, and absolutely knew nothing of the curatorship; that he and his counsel were compelled to make several trips to Carter County in trying to remove the curatorship to the county where the minor had always resided and had been cared for; that your guardian sought the aid of the U. S. Probate Attorneys and on one occasion Judge Jas. L. Hale made a trip with his attorneys to Ardmore to assist him in getting the curatorship removed and resisting the oil lease to Hamon; that the curator filed at least three final reports and when he would go to Ardmore to press the hearing on them they would be lost although the records showed that they were filed; and your guardian even furnished a copy of the report of the curator to the county judge of Carter County. It was finally acted upon, the curator discharged, and your guardian was then reappointed. The litigation has been very troublesome and expensive, and your guardian has lost considerable time and worry and trying to get the matter straightened up. He states that the minor has been living with him for several years as one of his family, and he feels that the amounts he is asking for are reasonable and have been necessary; that the child has been obtaining nice royalties from the Gas wells upon her property, and that said moneys are collected by the Indian Agency and are retained by the Government authorities.

Wherefore he would ask that his report be approved as presented.

Atha N. Thomas,
Guardian of Allie Daney.

The different receipts are charged into the vouchers for which credits are asked.

Defendant's Exhibit No. 35

State of Oklahoma, County of LeFlore. In the County Court at Talihina.

Motion of Hearing Final Report.

Notice is hereby given that a final report has been filed in the following case, and that said report is hereby set for hearing on Wednesday, November 4th, 1914, and any person interested in said report may appear on or before said date, and file objections in writing to the approval of said report;

said cases are as follows, to-wit: No. 46. In re guardianship of Allie Daney, a minor.

Final report of A. N. Thomas, guardian.

Witness my hand and the seal of this court this 19th day of Sept., 1914.

H. S. Pilgreen,
Clerk of County Court.
By C. J. Anderson, Deputy.

Endorsed: No. 46. Filed October 20, 1914. H. S. Pilgreen,
Clerk County Court (Seal) By C. J. Anderson, Deputy.

I hereby certify that I posted copies of this notice as follows, to-wit: One in front of Court house door, one in front of Indian Agent office and one in front of Post Office, all in the town of Talihina, Okla. This 20th day of October, A. D. 1914. C. J. Anderson, Deputy Clerk.

On July 3, 1911, Solomon Daney, father of Allie Daney, filed a verified petition in the County Court of LeFlore County, Oklahoma, alleging therein statutory grounds for the appointment of a guardian of said minor, and said petition was set down for hearing as provided by the Oklahoma Statutes and notice given as required by law, etc., and on July 24, 1911, the County Court of LeFlore County entered the following order:

Order Appointing Guardian.

State of Oklahoma, County of LeFlore.—In County Court.
In the Matter of the Guardianship of Allie Daney, a minor.

Now, on this 24th day of July, 1911, this cause comes on to be heard upon the petition of Solomon Daney, for the appointment of Atha N. Thomas, as guardian of the person and estate of Allie Daney, a minor, and it being first proven that notice of this hearing had been given by publication as required by law and said petitioner appearing by attorney and the court having heard the evidence offered in said cause, and being fully advised in the premises, it is ordered that Atha N. Thomas be and he is hereby appointed guardian of the person and estate of the above named Allie Daney, a minor, and that Letters of Guardianship issue to Atha N. Thomas upon his taking and subscribing the oath required by law, and executing a bond to said Allie Daney in the penal sum of Two Thousand Dollars, with sureties approved by the judge of said court.

(Signed) P. C. Bolger, County Judge.

Endorsed: Filed July 24-11 Pvt. W. Lane, Clerk County Court, by J. W. White, Deputy.

Recorded in Guardians Record book on page 71.

Under the aforesaid order, Atha N. Thomas made and filed a bond, qualified as guardian, and received letters of guardianship all in due form.

Defendants introduced certified copies of the records of the County Court of LeFlore County, Oklahoma, showing that on Sept. 24, 1914, Solomon Daney, father of Allie Daney, filed a verified petition in the County Court of LeFlore County for the appointment of a guardian for Allie Daney, his child, the said petition alleging on its face statutory grounds for the appointment of a guardian; due notice of the filing and hearing of said petition was given, as required by the statute, and Allie Daney, the minor, filed her written request in the County Court of LeFlore County asking the court to appoint Atha N. Thomas as her guardian, and the proceedings for the appointment of a guardian at that time were regular and in accordance with the Oklahoma statutes and after due notice and on the hearing, the court made and entered the following order, and thereupon Atha N. Thomas executed a bond as required by law and the order of court with good and sufficient sureties, etc., and on the order of the court letters of guardianship were issued to Atha N. Thomas. Said order of the court appointing Atha N. Thomas as guardian, is as follows:

Bull Head Defendant's Exhibit No. 10.

State of Oklahoma, County of LeFlore.—In County Court.
Order Appointing Guardian.

In the Matter of the Guardianship of Allie Daney, a minor.

Now, on this 30th day of September, 1914, this cause comes on to be heard upon the petition of Solomon Daney for the appointment of Atha N. Thomas as guardian of the person and estate of Allie Daney, a minor, and it being first proven that notice of this hearing had been given by posting notices in the manner required by law and order of this court and said petitioner appearing in person and the court having heard the evidence offered in said cause, and being fully advised in the premises, it is ordered that Atha N. Thomas be and is hereby appointed guardian of the person and estate of the above named Allie Daney and that letters of guardianship issue to Atha N. Thomas upon his taking and subscribing the oath required by law, and executing a bond to said

Allie Daney in the penal sum of Fifteen Thousand Dollars, with sureties approved by the judge of said court.

(Seal)

P. C. Bolger, County Judge.

Endorsed: No. 46. In Re Guardianship of.....
Order Appointing Guardian. Filed Sept. 30, 1914, and record-
ed in Book 1, page 125. H. S. Pilgreen, Clerk County Court,
by C. J. Anderson, Deputy. (Seal)

Proper letters of guardianship were issued to Atha N. Thomas on Sept. 30th, 1914, in accordance with the above order of appointment.

Defendant's Exhibit No. 15 shows that on the 4th day of November, 1905, J. J. Eaves filed a verified petition in the United States Court for the Southern District of the Indian Territory, sitting at Pauls Valley, stating that Allie Daney was a minor under the age of 14 years and alleging statutory grounds for the appointment of a curator, and prayed the court to appoint a curator. On the same date, Solomon Daney, the father of Allie Daney, filed in the United States Court for the Southern District of the Indian Territory at Pauls Valley, his written waiver of his right "to be appointed legal guardian or curator of said Allie Daney," and further said that "I do hereby declare that it is my desire that J. J. Eaves of Elk, Indian Territory, be appointed legal guardian or curator of the property of the said Allie Daney"; that on November 8, 1905, the United States Court for the Southern District of the Indian Territory sitting at Pauls Valley, Honorable J. T. Dickerson, regular judge, presiding, appointed said J. J. Eaves, curator of the estate of said Allie Daney, a minor, and thereupon C. M. Campbell, Clerk of the said United States Court for the Southern District of the Indian Territory, issued the following letters to said J. J. Eaves:

Letters of Guardianship.

United States of America, Indian Territory, Southern Dis-
trict—ss.

To All to Whom These Presents Shall Come—Greeting:

Know Ye, That whereas, J. J. Eaves has on this day been by United States Court in probate, in and for the said Southern District of the Indian Territory, been appointed guardian for Allie Daney, a minor under the age of 14 years, by entering into bond to the United States of America for the use of said minor, in the sum of \$1000.00 Dollars; and whereas, the said J. J. Eaves has this day filed his bond in such sum to the United States of America for the use of said minor, which said bond stands approved by the court.

Now, Therefore, he the said J. J. Eaves hereby authorized and empowered to collect and receive all moneys, property and effects that are now, or hereafter may become, due to h... said ward, and in general to do and perform all and similar the duties devolving upon h... as such guardian by law, or that may be enjoined upon him by the lawful order, sentence or decree of any court having competent jurisdiction.

In Testimony Whereof, I. C. M. Campbell, Clerk of the United States Court in Probate, in and for the said Southern District of the Indian Territory, hereto set my hand and affix the seal of said court at my office in Pauls Valley, this 8th day of November, A. D. 1905.

C. M. Campbell, Clerk;
By S. H. Wooton, Deputy.

That said Eaves filed a bond on November 8, 1905, which was approved by the court, and is as follows:

Curator's Bond.

United States of America, Indian Territory, Southern District.

Know All Men By These Presents:

That we, J. J. Eaves as principal, and United States Fidelity & Guaranty Company, as sureties, are held and firmly bound unto the United States of America, in the penal sum of One Thousand Dollars, for the payment of which, well and truly to be made, we bond ourselves, our heirs, executors and administrators, firmly by these presents.

Signed with our hands and sealed with our seals, this 4th day of November, A. D. 1905.

The Condition of This Obligation is Such, That Whereas, the said J. J. Eaves was on the day of November, A. D. 1905, appointed by the United States Court in Probate, in and for the said Southern District in the Indian Territory, Curator of Allie Daney, minor heir of Solomon Daney, under the age of 14 years. Now, if the said J. J. Eaves shall fully render according to law, just and true accounts of his curatorship, and if the said J. J. Eaves, his heirs, executors or administrators, upon the determination or ceasing of such guardianship, shall deliver and pay to the said minors, their executors or administrators, or any guardian that may be appointed for them after the determination or ceasing of the curatorship of said J. J. Eaves, all moneys, property and effects belonging to said minors in the possession or under the control of the said curator, and that shall be due to said minors from the said curator, and if the said curator shall

in all things faithfully perform and fulfill his duty as curator as aforesaid, then this obligation shall be void and of no effect; otherwise to be and remain in full force and virtue.

J. J. Eaves;

The United States Fidelity
and Guaranty Company,
By W. S. Wolverton and Son,
General Agents.

No. 29. Curator's Bond of J. J. Eaves, Curator of Allie Daney. Amount, \$1000.00.

Filed at Marietta, Feb. 5, 1906, 9 a. m. H. G. House, Deputy Clerk and Ex-officio Recorder, District No. 26, Ind. Ter.

Filed November 8, 1905, C. M. Campbell, Clerk, by S. H. Wooton, Deputy. (Seal)

Thereafter, and at the February term of the said United States Court for the Southern District of the Indian Territory, the said court made and entered an order on the petition of J. J. Eaves duly filed, transferring the probate proceedings in said matter to the United States Court at Marietta "together with the record and all papers there to be docketed for such proceedings as may be legal and proper"; that on February 5, 1906, said Eaves filed the following petition in the United States Court for the Southern District of the Indian Territory at Marietta, upon which the following order of court was entered:

United States Court for the Southern District of the Indian Territory. Sitting as a Court of Probate at Marietta.

In the Matter of the Guardianship of Allie Daney. J. J. Eaves, Guardian.

Probate No.

Your petitioner respectfully represents that heretofore, to-wit, on the 8 day of November, 1905, he was duly appointed guardian of the above named minor, and executed a bond in the sum of \$2000.00 with the United States Fidelity and Guaranty County, as surety.

That your petitioner was required to execute said bond in the sum of two thousand dollars for each of said minors. That a bond of one thousand dollars will more than cover the assets that will be in the hands of your guardian at any one time as guardian of said minors; that their sole assets consist of their allotments of land as members of the Choctaw or Chickasaw Tribe of Indians, and the sole income from said lands is the rentals arising therefrom under contracts approved by this court, which do not exceed \$75.00 per year.

and that the said rentals so paid, or the larger part thereof, are necessary to be advanced for the support and maintenance of said minors during the year. That the procuring of a bond in the sum of two thousand dollars is an unnecessary expense to said estate.

Your petitioner further represents that United States Fidelity and Guaranty Company has heretofore been his bondsman, and he desires to substitute the Southern Trust Company of Atoka, I. T., as bondsman, and asks that said United States Fidelity and Guaranty Company, his previous bondsman, be discharged from any other and further liability than that accruing up to the time of the making of this order, and that his bond with the Southern Trust Company, of Atoka, Indian Territory, be accepted and charged with all future liability on account of his conduct as guardian herein.

That he hereby tenders a bond as guardian in the sum of One Thousand Dollars with the Southern Trust Company, of Atoka, Indian Territory, as surety thereon.

J. J. Eaves, Guardian.

Statement of Cost.

Pauls Valley, Feb. 2, '06.

In the Matter of Allie Daney, a minor.

Deposit \$10.00

Clerk's Cost at Pauls Valley.....\$6.70
Check herewith 3.30 \$10.00

Attest and Correct, C. M. Campbell, Clerk, by S. H. Wooton,
Deputy.

No. 378. Allie Daney, a minor. Statement of Costs.

Filed at Marietta, Feb. 5, 1906, 9 A. M., H. G. House,
Deputy Clerk and Ex-officio Recorder, District No. 26, Ind.
Ter.

In the United States Court for the Southern District of the
Indian Territory. Sitting as a Court of Probate at Mari-
etta.

In the Matter of the Guardianship of Allie Daney. J. J. Eaves,
Guardian.

Probate No.

"On the day came on to be heard the application of J. J. Eaves, the guardian of Allie Daney, for permission to reduce his bond as guardian herein, from the sum of \$2000.00 Dollars for each minor, to the sum of \$1000.00 Dollars. And it appearing from the evidence in said case that a good bond

in the sum of \$1000.00 Dollars is amply sufficient to protect the interest of said minors, and that it would be more economical for said estate, it is

Ordered, That said bond be and the same is hereby reduced from \$2000.00 Dollars to \$1000.00 Dollars for each minor.

The paryer of the said guardian is further granted that a new bond be accepted with the Southern Trust Company, of Atoka, I. T., as surety, and that his previous bondsmen be discharged from any liability accruing subsequent to the date of the approval of said bond with the Southern Trust Company, of Atoka, I. T., as surety."

On the 5th day of February, 1906, and April 18, 1906, Eaves filed the two following reports, and on March 5, 1907, the United States Court at Marietta, Indian Territory, made the following order:

In the United States Court for the Southern District of the Indian Territory, at Pauls Valley.

In re the estate of Allie Daney. No. 378. J. J. Eaves, Guardian.

To the Honorable J. T. Dickerson:

Comes now the guardian herein, and respectfully represents to the court, that as such guardian, he selected at the Chickasaw Land Office for the said minor, lands in allotment, located in sections 11 and 14, T. 6 S., E. 2 W., and that that said lands are located within the Marietta division of the Southern District of the Indian Territory.

Wherefore said guardian petitions this court to transfer said cause to Marietta.

J. J. Eaves, Guardian.

No. 29. In the Matter of the Guardianship of Allie Daney. Petition for Transfer.

Filed at Marietta, Feb. 5, 1906, 9 A. M., H. G. House, Deputy Clerk and Ex-officio Recorder, District No. 26, Ind. Ter.

Filed in open court Feb. 1, 1906, C. M. Campbell, Clerk, by S. H. Wootton, Deputy.

Guardian or Curator's Inventory and Affidavit.

In the Estate of Allie Daney, a minor.

Indian Territory, Southern District.

Inventory of all lands belonging to the estate of Allie Daney, minor, in the Southern District, Indian Territory.

Comprising a full and complete legal description, showing the location of the lands of said minor, together with the nature and value of the improvements located thereon:

NW4 of SE4 and W2 of NE4 of SE4 and NW4 of SE4 of SE4 and N2 of SW4 of SE4 of Section 19, Township 1 South, Range 5 West, and W2 of SW4 of SW4 and S2 of NW4 of SW4 of Section 4, Township 4 South, Range 3 West, and W2 of W2 of SE4 and E2 of SW4 of SE4 of Section 9, Township 2 North, Range 6 West, and SE4 of SE4 of SE4 of Section 11, and E2 of NE4 of NE4, and NE4 of SE4 of NE4 of Section 14, Township 6 South, Range 2 West, containing 230 acres of the value of \$1,-010.00.

This estate is possessed of no other property.

Affidavit of Guardian or Curator.

Indian Territory, Southern District—ss.

Bt It Remembered, That on this 16 day of February, 1906, A. D., before me, the undersigned authority, personally appeared J. J. Eaves, of Elk, postoffice, guardian or curator of Allie Daney, minor, who, being by me duly sworn, on oath says that the foregoing is a full inventory and description of all the lands belonging to the estate of said minor, together with the estimated value of the improvements located thereon.

J. J. Eaves.

Subscribed and sworn to before me this 16 day of Feb., 1906. J. S. Mullen, Notary Public, Southern District, Indian Territory.

No. 27. Filed at Marietta, April 18, 1906, 9 A. M., H. G. House, Deputy Clerk and Ex-officio Recorder, District No. 26, Ind. Ter.

United States Court for Southern Dist. Ind. Ter.

On this the 5th day of March, 1907, this matter came on to be heard, and the court being fully advised in the premises is of the opinion that the Southern Trust Co., of Atoka, I. T., should be substituted as bondsmen in the place of the United States Fidelity and Guaranty Company, of Baltimore, Md., and that said United States Fidelity and Guaranty Company should be discharged as surety.

It is therefore ordered, considered and adjudged by the court that the Southern Trust Company, of Atoka, I. T., be and the same is hereby substituted as bondsman, and that the United States Fidelity and Guaranty Co., of Baltimore, Md.,

be and the same is discharged from liability accruing subsequent to the date of the approval of the bond of said Southern Trust Company, of Atoka, I. T.

P. B. No. 29. E. in J., pg. 272.

Filed at Marietta, March 6, 1907, 9 A. M., H. G. House, Deputy Clerk and Ex-officio Recorder, District No. 26, Ind. Ter.

That upon the admission of Oklahoma as a state on November 16th, 1907, all guardianships, curatorships, administrations, and probate proceedings pending in the United States Court for the Southern District of the Indian Territory, at Marietta, Indian Territory, passed into the County Court of Love County, Oklahoma, said County Court of Love County, Oklahoma, being the successor to the United States Court for the Southern District of the Indian Territory in all probate proceedings pending at Marietta, in said court; that on the 26th day of January, 1914, the County Court of Love County, Oklahoma, on the petition of J. J. Eaves, as curator of Allie Daney, entered the following order directing Eaves, as curator, to join in the oil and gas lease executed by A. N. Thomas, as guardian of Allie Daney, to T. H. Dunn and J. Robert Gillam. Said order authorizing and directing Eaves, as curator, to join in the Dunn and Gillam lease, the report of Eaves filed in the County Court, and the County Court's order of confirmation being as follows:

In the County Court within and for Love County, Oklahoma.

—In the Matter of the Guardianship of Allie Daney, a Minor.—Probate Number

Order Authorizing Guardian to Execute Oil and Gas Lease.

This cause coming on to be heard on this the 26 day of January, 1914, upon the petition of J. J. Eaves, curator, and it appearing to the court that on the 19th day of August, 1913, one A. N. Thomas, as guardian of Allie Daney, a minor, executed an oil and gas lease upon the lands described in the petition of the said J. J. Eaves, under orders of the County Court of LeFlore County, Oklahoma, which said lease was approved by the County Court of LeFlore County, Oklahoma, on the same day, to T. H. Dunn and J. Robt. Gillam, and it appearing further that the execution of another lease upon said lands to other persons would be detrimental to the interests of said minor;

Now, Therefore, it is ordered by the court that J. J. Eaves, as curator of the estate of Allie Daney, join in said lease to T. H. Dunn and J. Robt. Gillam, by the execution, in

proper form, of the same oil and gas lease heretofore executed by said A. N. Thomas.

J. H. Hays,
Judge of the County Court of
Love County, Oklahoma.

Filed and entered January 26, 1914.

In the County Court Within and for Love County, Oklahoma.

In the matter of the Guardianship of Allie Daney, a minor. Probate Number

Report of Leasing for Oil and Gas.

Now comes J. J. Eaves, curator herein, and shows to the court that in pursuance of the orders of this court, made and entered herein, he has joined in the execution of a certain oil and gas lease made by A. N. Thomas, as the guardian of Allie Daney, on the 19th day of August, 1913, to T. H. Dunn and J. Robt. Gillam, with the conditions and terms as required by the Department of the Interior, governing the leasing of restricted lands of full-blood Indians, which said lease covers the following described lands, to-wit: The S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ and W $\frac{1}{2}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 4, Township 4 South, Range 3 West.

Wherefore, petitioner asks that the same be approved by this court.

J. J. Eaves,
Curator of the Estate of Allie Daney, minor.

State of Oklahoma, Carter County ss.

J. J. Eaves, being first duly sworn, upon oath states that he had read the above and foregoing petition, and knows the contents thereof, and that the matters and things therein stated are true. F. M. Adams, Notary Public. My commission expires January 11, 1915.

Estate of Allie Daney, a minor. Report of Oil and Gas Lease. Filed Jan. 26, 1914, J. H. Hays, County Judge.

In the County Court Within and for Love County, Oklahoma.

In the matter of the Guardianship of Allie Daney, a minor. Probate Number

Order Approving and Confirming Oil and Gas Mining Lease.

Now upon this 26 day of January, 1914, came on to be heard the report of J. J. Eaves, curator of the estate of Allie Daney, a minor, showing that upon the 26th day of January, 1914, said J. J. Eaves, as said curator, joined in the execution of an oil and gas mining lease, under forms prescribed

by the Department of the Interior, dated August 19, 1913, to T. H. Dunn and J. Robt. Gillam, upon the following described lands, to-wit: The S $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ and W $\frac{1}{2}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 4, Township 4 South, Range 3 West; and the court being fully advised in the premises, and believing it to be for the best interest of said minor;

It is therefore, ordered by the court that said oil and gas lease executed on the 19th day of August, 1913, by A. N. Thomas, guardian, to T. H. Dunn and J. Robt. Gillam, and executed on the 26 day of January, 1914, by J. J. Eaves as curator of Allie Daney, be and the same is hereby, in all things approved and confirmed.

J. H. Hays,

Judge of the County Court, Love County, Oklahoma.

#152. Estate of Allie Daney, a minor. Order approving oil and gas lease. Filed Jan. 26, 1914. J. H. Hays, County Judge.

That on October 11th, 1913, Eaves filed the following report in the County Court of Love County:

In the County Court Within and for Love County, Oklahoma.

In the matter of the guardianship of Allie Daney, a minor. J. J. Eaves, curator or guardian.

Report of J. J. Eaves, Curator.

Comes now J. J. Eaves and presents herewith his report as curator of the estate of Allie Daney, a minor, and alleges and states:

That the following is a true and correct statement of all moneys, property and estate coming into the hands of J. J. Eaves, as guardian.

(1). Petition shows that said Allie Daney is the allottee of certain lands situate in Carter and Stephens counties; That J. J. Eaves took possession of the lands of said minor at the time of his appointment, in to-wit, the year 1905, and has since said date leased said lands.

(2). That J. S. Mullen leased said lands for the years 1905 and 1906, 1907, 1908, 1909, 1910, 1911, 1912 and 1913 from said J. J. Eaves, guardian as aforesaid, for the sum of \$50.00 a year, and with the additional consideration that said J. S. Mullen agreed to and did place in a thorough state of cultivation more than one hundred acres of said land, which was in a raw state prior to the leasing of the same to the said J. S. Mullen. That under said lease contract said J. S. Mullen agreed to and did fence all of said lands with a good and substantial fence, which your guardian [] has been done. Your guardian further represents that said J. S. Mullen has

fully complied with said contract and has paid all lease moneys due under said lease contracts. Your guardian further represents that he has paid over or caused to be paid over all moneys coming into his hands from any source to Solomon Daney, father of said Allie Daney, a minor, for the use, support and maintenance of said minor. And your guardian further says that the above mentioned sum of \$450.00 is all that has come into his possession belonging to said minor, except the sum of \$15.00 paid to your guardian as a bonus on a lease on certain lands belonging to said minor located in Township 4 South, Range 3 West, for oil and gas purposes, which lease has heretofore been approved by this court.

Dated this October 10, 1913.

J. J. Eaves,
Curator or Guardian.

State of Oklahoma, County of Carter, ss.

J. J. Eaves, being first duly sworn on his oath says that he is the guardian or curator above mentioned, and that he has read the above and foregoing and that the same is true and correct.

J. J. Eaves.

Subscribed and sworn to before me this October 10, 1913. E. Dunlap, Notary Public. My commission expires Jan. 11, 1913.

In the County Court in Love County, Okla. In the matter of the guardianship of Allie Daney, a minor. J. J. Eaves, curator or guardian. Report of J. J. Eaves, curator.

Filed Oct. 11, 1913. J. H. Hays, County Judge.

On the 31st of March, 1914, by proper order of the County Court of Love County, the Eaves curatorship was transferred to the County Court of Carter County, Oklahoma, and on June 18th, 1914, Eaves filed the following report in the County Court of Carter County, Oklahoma:

In the County Court Within and for Carter County, Oklahoma. In the matter of the guardianship or curatorship of Allie Daney, a minor. J. J. Eaves, guardian.

Comes now J. J. Eaves, guardian or curator of the estate of Allie Daney, a minor, and resigns as guardian or curator herein, and asks this court to enter its order discharging said guardian, and relieving said bondsmen and his bond from any liability on said bond.

Your petitioner represents that he was appointed curator of said minor many years ago, and here makes reference to his report filed October 10, 1913, as showing all of his collections and disbursements up to that time.

Your petitioner further shows to the court that since his said report, he has leased the homestead allotment of said minor, for the sum of \$35.00 per year, for the year 1914, said rental money payable quarterly and rented the surplus allotment of said minor for a period of five years, for the sum of \$50.00 per year, rental payable every three months of each year.

Your petitioner further shows that there is some fund or sum of moneys with the office of the Indian Superintendent at Muskogee, the exact amount of which is to petitioner unknown, belonging to said minor.

Your petitioner shows that at the time of making the last report, on, to-wit: October 10, 1913, he had on hand \$15.00 in money belonging to said minor. That since said date there has been paid to said minor, through her father, Solomon Daney, the following amounts:

Nov. 8, 1913,	\$10.00
Nov. 8, 1913,	10.00
Dec. 10,	5.00
Dec. 12,	9.00
Dec. 18,	10.00
Dec. 23,	20.00
Jan. 6,	15.75
Jan. 12,	10.00
Apr. 11,	20.00
 Total of	 \$119.75

That under said lease contracts there was only due the sum of \$42.50 since the last report, but that under said lease contracts, J. S. Mullen, the lessee of said lands, has paid \$119.75, in the amounts and on the dates above mentioned, to Solomon Daney, the father of said minor, and your curator says that the said Mullen has made said payments direct at the request of the said curator. That theretofore to date the said J. S. Mullen is entitled to future credit on said leases to the amount of \$77.25, for which your guardian asks that said J. S. Mullen, lessee of said minor's lands, be allowed the proper credit.

Your curator shows to the court, that F. M. Adams, as attorney for your curator, paid the sum of \$17.65 as court costs for the transfer of said cause from Love County, Oklahoma, to Carter County, Oklahoma, and further shows to the court that said amount is still due the said Adams and unpaid.

Your curator further shows to the Court that there is another proceeding pending in LeFlore County, Okla.

Your guardian represents that the \$15.00 due at the last report has been turned over to Solomon Daney, father of said

Allie Daney, for her use. That your guardian now has no funds belonging to said minor.

Wherefore, your guardian or curator prays that he be permitted to resign, and that his final report be approved, and that his bond, and the liability of his bondsmen be discharged, and that this court allow the sum of \$17.65 as costs to the said F. M. Adams, in payment for costs incurred in transfer of this cause to Carter County, Oklahoma, and that this court adjudge the accounts of said curator and guardian as above stated.

J. J. Eaves, Curator.

State of Oklahoma, County of Carter, ss.

J. J. Eaves, being first duly sworn on oath, says that he is guardian or curator for Allie Daney, a minor, in the above numbered and styled cause, and that he has read the above and foregoing and that the same is true.

J. J. Eaves.

Subscribed and sworn to before me this June 18, 1914. E. Dunlap, Notary Public. My commission expires January 11, 1915.

#686. Final Report. Filed Jun. 18, 1914. G. K. Leeman, Clerk County Court, Carter County, Oklahoma.

That on the 12th day of September, 1914, Eaves having filed his final report and resignation in the County Court of Carter County, the said County Court did on the 12th day of September, 1914, make and enter an order directing that said "J. J. Eaves be and is hereby discharged as curator in this cause, and that his final report be approved and his bondsmen be discharged from any further liability."

On September 22nd, 1914, the County Court of Carter County, acting on proper petition, etc., made and entered an order in said Eaves curator cause, pending in that court, ordering and directing "That the clerk of this court be and he is hereby directed and authorized to transfer all papers in said cause to the County Court of LeFlore County, sitting at Talihina, in Oklahoma, forthwith," and ordered the transfer of said cause to the County Court of LeFlore County accordingly; and said order of transfer was immediately complied with, and the record, etc., filed in the County Court of LeFlore County, at Talihina.

The above and foregoing is a true, complete and correct statement of all the evidence contained in the record, and it is so agreed by the parties.

UNITED STATES OF AMERICA,

By W. A. LEDBETTER,
Special Assistant United
States Attorney.

WM. B. JOHNSON,
W. G. DAVISSON,
FRANK ADAMS,
GEO. S. RAMSEY,
Attorneys for Appellees and
Cross Appellants.

January 3d, 1922.

The above and foregoing statement of the evidence is hereby approved by me, the judge before whom said case was tried.

R. L. WILLIAMS,
Judge.

Filed, Jan. 3, 1922. W. V. McClure, Clerk.

Petition for Appeal.

To the Honorable R. L. Williams, Judge of the United States District Court for the Eastern District of Oklahoma:

Now comes the plaintiff in the above cause, to-wit: United States of America, and, conceiving itself aggrieved by the final order, decree and judgment rendered in the above numbered and entitled cause on the 7th day of June, 1921, hereby appeals from said final order, decree and judgment. And the said plaintiff, United States of America, prays that this its appeal to the United States Circuit Court of Appeals for the Eighth Circuit may be allowed and that the transcript of the record and proceedings and the papers upon which said final order, decree and judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Eighth Circuit.

Said plaintiff, United States of America, asks that an order be made and entered authorizing said plaintiff to prosecute said appeal without security.

Said plaintiff United States of America herewith submits its assignment of errors.

UNITED STATES OF AMERICA, Plaintiff.

By W. A. LEDBETTER,
Special Assistant United States Attorney.

LEDBETTER, STUART,
BELL & LEDBETTER,
Of Counsel.

Muskogee, Oklahoma, Dec. 2, 1921.

The above appeal allowed without security on this the 2nd day of December, 1921.

R. L. WILLIAMS,
Judge United States District Court.
Eastern District of Oklahoma.

Filed Dec. 2, 1921, W. V. McClure, Clerk.

Assignment of Errors.

Now comes the plaintiff, the United States of America, by W. A. Ledbetter, Special Assistant United States Attorney, and respectfully allege that the following errors occurred in the proceedings and in the final decree in the above styled cause, in the United States Court for the Eastern District of Oklahoma:

First: The court erred in finding and holding that the plaintiff was not entitled to recover and in dismissing the plaintiff's bill of complaint herein.

Second: The court erred in not rendering a judgment and decree herein, in favor of the complainant holding illegal and void as against T. H. Dunn and J. Robert Gillam, the oil and gas lease dated August 18th, 1913, executed by A. N. Thomas, Guardian of Allie Daney, to T. H. Dunn and J. Robert Gillam, covering the South Half of the Northwest Quarter of the Southwest Quarter, and the West Half of the Southwest Quarter of the Southwest Quarter of Section four, Township 4 South, Range 3 West in Carter County, Oklahoma, and in not rendering a decree herein requiring the said T. H. Dunn and his wife Mrs. N. E. Dunn and J. Robert Gillam and his wife Mrs. J. Robert Gillam to account for all monies received by them as the proceeds from oil and gas derived from the premises covered by said oil and gas lease, and as dividends on stock held by them in the Bull Head Oil Company, and in not rendering a decree herein holding that since the said T. H. Dunn and J. Robert Gillam assigned said oil and gas lease to

the Bull Head Oil Company and since the said Bull Head Oil Company paid value therefor and became an innocent purchaser for value of said lease, the said T. H. Dunn and J. Robert Gillam were liable in damages to the complainant herein for the value of said lease at the date of the trial.

Third: The court erred in holding that the said oil and gas lease executed by A. N. Thomas, guardian, to said T. H. Dunn and J. Robert Gillam on the 18th day of August, 1913, was rendered valid and binding on the estate of said Allie Daney because of the fact that J. J. Eaves as curator of the estate of said Allie Daney, a minor, attached his signature as such curator to said oil and gas lease and acknowledged the execution of the same before a notary public, and the court erred in not holding that said oil and gas lease was illegal and void as against the said T. H. Dunn and J. Robert Gillam, and their wives, Mrs. N. E. Dunn and Mrs. J. Robert Gillam, notwithstanding the fact that said J. J. Eaves as curator of the estate of said Allie Daney attached his signature to and acknowledged the execution of said lease.

Fourth: The court erred in not holding said oil and gas lease executed as aforesaid on the 18th day of August, 1913, by A. N. Thomas, guardian of Allie Daney, to T. H. Dunn and J. Robert Gillam was illegal and void for the reason that the same was procured by the fraudulent agreement made and entered into by and between the said T. H. Dunn and J. Robert Gillam and the said A. N. Thomas, guardian of Allie Daney, whereby it was agreed that the said A. N. Thomas was to have and own for his personal and private use an undivided one-fourth interest in said oil and gas lease, which interest was agreed to be held and carried in the name of John J. Thomas, father of said A. N. Thomas; which said fraudulent agreement was further carried into effect by a subsequent arrangement whereby the interest which the said A. N. Thomas was to have and own in said oil and gas lease was reduced to a one-eighth interest in said oil and gas lease, and which said fraudulent agreement was further carried into effect by the said T. H. Dunn and J. Robert Gillam and the said A. N. Thomas in that it was agreed that when the Bull Head Oil Company, a corporation, was organized, the said T. H. Dunn should hold in his name as trustee for A. N. Thomas, stock which was the equivalent of said one-eighth interest in the oil and gas lease, and the said T. H. Dunn did hold in his name as trustee stock in the said Bull Head Oil Company of the par value of \$2,000.00 for the personal and private use and benefit of the said A. N. Thomas; and afterwards, to-wit: in the months of August and September, 1915, said fraudulent agreement was finally consummated by the payment to said A. N.

Thomas for his personal and private use and benefit of the sum of \$3500.00 in money and the delivery to him of a Saxon automobile.

Fifth: Under the clear preponderance of the evidence and the finding of fact by the court, the said oil and gas lease was fraudulent, illegal and void as against the said T. H. Dunn and J. Robert Gillam, and their wives, Mrs. N. E. Dunn and Mrs. J. Robert Gillam, and the court erred in not rendering a judgment and decree herein declaring said oil and gas lease fraudulent, illegal and void as to them.

Sixth: The court erred in not rendering judgment herein in favor of plaintiff United States of America, and against defendants T. H. Dunn and wife N. E. Dunn and J. Robert Gillam and wife Mrs. J. Robert Gillam, for the value of the oil and gas lease executed on August 18, 1913, by A. N. Thomas, guardian of Allie Daney, to T. H. Dunn and J. Robert Gillam, in controversy in this cause, at the time of the trial of this cause.

Seventh: The court erred in not rendering judgment in favor of plaintiff United States of America, and against defendants T. H. Dunn and wife N. E. Dunn and J. Robert Gillam and his wife Mrs. J. Robert Gillam, for all monies received by said four defendants, or any one or more of them for the proceeds of oil and gas derived from the premises covered by the oil and gas lease executed by A. N. Thomas, guardian, to T. H. Dunn and J. Robert Gillam, in controversy in this cause, and on stock in the Bull Head Oil Company, received by said defendants T. H. Dunn and wife N. E. Dunn and J. Robert Gillam and wife Mrs. J. Robert Gillam, or any one or more of them.

Eighth: The court erred in not holding that T. H. Dunn and N. E. Dunn hold the stock issued to them in the Bull Head Oil Company, as trustees for the benefit of the plaintiff herein, and in not decreeing the sale thereof for the use and benefit of the plaintiff herein.

Wherefore, the plaintiff, United States of America, prays that said judgment of the District Court of the United States for the Eastern District of Oklahoma, in so far as it denied plaintiff any relief against the defendants, T. H. Dunn and wife N. E. Dunn and J. Robert Gillam and wife Mrs. J. Robert Gillam, be reversed, set aside and held for naught, and that the proper judgment be rendered by the Honorable Circuit Court of Appeals for the Eighth Circuit, against the said defendants in favor of this appellant, and that if said judgment in favor of this appellant cannot be rendered by said United States Circuit Court of Appeals for the Eighth Cir-

euit, that said United States Circuit Court of Appeals for the Eighth Circuit, direct the rendition of the proper judgment by the District Court of the United States for the Eastern District of Oklahoma.

UNITED STATES OF AMERICA

By W. A. LEDBETTER,

Special Assistant United States Attorney.

LEDBETTER, STUART,
BELL & LEDBETTER,

Of Counsel.

Filed Dec. 2, 1921, W. V. McClure, Clerk.

Order Allowing Appeal Without Security.

On this the 2nd day of December, 1921, at Muskogee, Oklahoma, came on to be heard petition of plaintiff, United States of America, for an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, said petition being presented at said Muskogee, Oklahoma, to the undersigned Judge of the United States District Court for the Eastern District of Oklahoma; said petition also asking that an order be made and entered allowing the prosecution of said appeal without security. Said plaintiff United States of America also submitted its assignment of errors.

Said petition for such appeal is allowed.

It is therefore ordered, adjudged and decreed that said petition for an appeal be and the same is hereby allowed as prayed for.

It is further ordered, adjudged and decreed that said plaintiff be allowed and permitted to prosecute said appeal without security.

R. L. WILLIAMS,

Judge of the United States District Court
for the Eastern District of Oklahoma.

Filed Dec. 2, 1921, W. V. McClure, Clerk.

Citation on Appeal.

The United States of America to T. H. Dunn, N. E. Dunn, Don Russell, J. Robert Gillam, Mrs. J. Robert Gillam, L. S. Dolman, Errett Dunlap, Frank L. Ketch as Administrator of the Estate of Jake L. Hamon, deceased, E. L. McCain, J. S. Mullen, F. M. Adams, Bull Head Oil Company and the First National Bank of Ardmore.—Greeting.

You and each of you are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, State of Missouri, sixty days from and after this citation bears date, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Eastern District of Oklahoma, wherein United States of America is Appellant, and you, the said T. H. Dunn, N. E. Dunn, Don Russell, J. Robert Gillam, Mrs. J. Robert Gillam, L. S. Dolman, Errett Dunlap, Frank L. Ketch as Administrator of the estate of Jake L. Hamon, deceased, E. L. McCain, J. S. Mullen, F. M. Adams, Bull Head Oil Company and the First National Bank of Ardmore, are appellees, to show cause, if any there be, why the judgment rendered against said Appellant in said appeal mentioned should not be reversed, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable R. L. Williams, Judge of the District Court of the United States for the Eastern District of Oklahoma, on this the 2nd day of December, in the Year of Our Lord Nineteen Hundred Twenty-one.

R. L. WILLIAMS,
Judge of the District Court of the
United States for the Eastern Dis-
trict of Oklahoma.

On behalf of the defendants T. H. Dunn, N. E. Dunn, Don Russell, J. Robert Gillam, Mrs. J. Robert Gillam, L. S. Dolman, Errett Dunlap, Frank L. Ketch, as administrator of the Estate of Jake L. Hamon, deceased, E. L. McCain, J. S. Mullen, F. M. Adams, Bull Head Oil Company, and each of said defendants, service of the above and foregoing citation is hereby accepted on this the 2nd day of December, 1921.

GEO. S. RAMSEY,
WM. B. JOHNSON,
W. G. DAVISSON,

Attorneys for said T. H. Dunn, N. E. Dunn, Don Russell, J. Robert Gillam, Mrs. J. Robert Gillam, L. S. Dolman, Errett Dunlap, Frank L. Ketch, as administrator of the estate of Jake L. Hamon, deceased, E. L. McCain, J. S. Mullen, F. M. Adams, and Bull Head Oil Company.

The First National Bank of Ardmore hereby acknowledges service of the above and foregoing citation on this the 3rd day of December, 1921.

D. LACY,
President of The First National
Bank of Ardmore.

Attest: ED SANDLIN, Cashier.

Defendants' Petition for Appeal.

To the Honorable District Judges, Etc.:

The above named defendants, to-wit, The Bull Head Oil Company, a corporation, J. S. Mullen, F. M. Adams, Frank L. Ketch, as Administrator of the Estate of Jake L. Hamon, deceased, E. L. McCain, Don Russell, L. S. Dolman, Errett Dunlap, T. H. Dunn, N. E. Dunn, J. Robt. Gillam and Mrs. J. Robert Gillam, feeling themselves aggrieved by the decree made and entered in this case on the 7th day of June, 1921, at a term of this court held at Hugo, do hereby appeal from the said decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors, which is filed herewith; and they pray that this appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit. And the defendants present this petition for appeal as their several, as well as joint petition for appeal, and they pray that the proper order touching the security to be required be made, etc.

W. B. JOHNSON,
WM. G. DAVISSON,
GEO. S. RAMSEY,
FRANK F. ADAMS,
Counsel for Defendants.

Now on this the 2nd day of Dec., 1921, the above petition is granted and the appeal allowed upon defendants giving bond conditioned as required by law, in the sum of One Thousand (\$1,000.00) Dollars.

R. L. WILLIAMS, District Judge.

Filed Dec. 2, 1921, W. V. McClure, Clerk.

Assignments of Error.

Come now the defendants, the Bull Head Oil Company, a corporation, J. S. Mullen, F. M. Adams, Frank L. Ketch.

as Administrator of the Estate of Jake L. Hamon, deceased, E. L. McCain, Don Russell, Errett Dunlap, T. H. Dunn, N. E. Dunn, J. Robert Gillam and Mrs. J. Robert Gillam, and L. S. Dolman, jointly and severally, each on behalf of himself and all the defendants together jointly, on this 2nd day of Dec., 1921, and say that the decree entered in the above styled cause on the 7th day of June, 1921, is erroneous and unjust to defendants insofar only as the said decree does not give the defendants cross relief and order and decree that the Departmental oil and gas mining lease, executed August 19, 1913, by A. N. Thomas, purporting to be guardian of Allie Daney, and by J. J. Eaves, on January 26, 1914, curator of Allie Daney, to T. H. Dunn and J. Robert Gillam, lessees, be reformed so as to insert by decree in the body of said lease and in the granting and demising clause thereof, the following: "J. J. Eaves, curator of Allie Daney, a minor," as lessor.

Wherefore, defendants pray that the said decree be reversed insofar only as the same denies these cross-appellants relief by way of reformation, and these defendants pray that the said decree be reversed and modified and that this court issue its proper procedendo instructing the lower court to enter a judgment and decree in defendants' favor reforming said lease accordingly.

WM. B. JOHNSON,
WM. G. DAVISSON,
GEO. S. RAMSEY,
FRANK M. ADAMS,

Counsel for Defendants and Cross Appellants.

Filed Dec. 2, 1921, W. V. McClure, Clerk.

Bond on Cross Appeal.

Know all men by these presents:

That we, The Bull Head Oil Company, a corporation, J. S. Mullen, F. M. Adams, Frank L. Ketch, as Administrator of the Estate of Jake L. Hamon, deceased, E. L. McCain, Don Russell, Errett Dunlap, T. H. Dunn, N. E. Dunn, J. Robt. Gillam and Mrs. J. Robt. Gillam, as principals, and T. D. Wagner and G. L. Carr, as sureties, acknowledge ourselves to be jointly indebted to the United States of America, cross-appellee in the above styled cause, in the sum of One Thousand (\$1,000.00) Dollars, conditioned that,

Whereas, on June 7, 1921, in the District Court of the United States for the Eastern District of Oklahoma, in a suit pending in that court, where in the United States of America was plaintiff, and these defendants and others were

defendants, numbered on the Equity docket as Equity No. 2591, a judgment was rendered against these defendants to the extent of denying them a reformation of the lease involved, and these defendants having obtained an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, and filed a copy thereof in the office of the clerk of the court to reverse the said decree, and a citation directed to the said United States of America citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Eighth Circuit; now, if the said defendants herein named shall prosecute their appeal to effect and answer all damages and cost if they fail to make good their plea, then the above obligation to be void, else to remain in full force and effect.

The 29 day of November, 1921.

THE BULL HEAD OIL COMPANY,
a corporation,
By E. Dunlap, President.

Attest:

F. E. Stayton, Secretary.
(Corporate Seal)

E. DUNLAP,
FRANK K. KETCH, Administrator of the Estate of Jake L. Hamon,
By F. R. Ellis, Attorney,

E. L. McCAIN,
By Geo. S. Ramsey, Atty.,

DON R. RUSSELL,
By F. M. Adams, his Atty.,

J. S. MULLEN,

T. H. DUNN,

N. E. DUNN,

J. ROBT. GILLAM,

MRS. J. ROBT. GILLAM,
Principals.

T. D. WAGNER,

A. L. CARR,

Sureties.

Muskogee, Okla., Dec. 2nd, 1921.

The above bond examined and approved by the court.

R. L. WILLIAMS, Judge.

Filed Dec. 2, 1921. W. V. McClure, Clerk.

Citation.

United States of America to United States of America and the First National Bank of Ardmore, Oklahoma, Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Eastern District of Oklahoma, wherein the United States of America is plaintiff, and the Bull Head Oil Company, a corporation, J. S. Mullen, F. M. Adams, L. S. Dolman, Frank L. Ketch, as Administrator of the Estate of Jake L. Hamon, deceased, E. L. McCain, Don Russell, Errett Dunlap, T. H. Dunn, N. E. Dunn, J. Robert Gillam and Mrs. J. Robert Gillam, and The First National Bank of Ardmore, Oklahoma, are defendants, an appeal has been allowed the following defendants, to-wit: The Bull Head Oil Company, a corporation, J. S. Mullen, F. M. Adams, Frank L. Ketch, as Administrator of the Estate of Jake L. Hamon, deceased, E. L. McCain, Don Russell, Errett Dunlap, L. S. Dolman, T. H. Dunn, N. E. Dunn, J. Robert Gillam and Mrs. J. Robert Gillam, to the United States Circuit Court of Appeals for the Eighth Circuit:

You and each of you are hereby cited and admonished to be and appear in said court within sixty (60) days after date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice shown the parties in that behalf.

Witness, the Honorable R. L. Williams, Judge of the United States District Court for the Eastern District of Oklahoma, this the 2nd day of Dec., 1921.

R. L. WILLIAMS,
Judge of the United States District Court
for the Eastern District of Oklahoma.

On behalf of the United States of America service of the above citation is this day acknowledged, to-wit, the 2nd day of December, 1921.

W. A. LEDBETTER,
Special Assistant United States Attorney,
Counsel for Plaintiff.

LEDBETTER, STUART,
BELL & LEDBETTER,
Of Counsel.

On behalf of The First National Bank of Ardmore, Oklahoma, service of the above citation is acknowledged on this to-wit, the 3rd day of December, 1921.

D. LACY. President.
Attest: ED SANDLIN, Cashier.

Order.

For good cause shown, the time to make return under the citations issued and served on appeal from the final judgment of this court in this case, is extended for a period of thirty additional days, and the time for the appellant and cross-appellants to docket case and file the record with the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, is hereby extended and enlarged so as to add to the period required by the citations, thirty days additional time.

Made and entered this 3rd day of January, 1922.

R. L. WILLIAMS, Judge.

Filed Jan 3 1922, W. V. McClure, Clerk.

Praecepice for Record in Court of Appeals.

To the Clerk of the United States Court for the Eastern District of Oklahoma:

In making up the record and transcript for the United States Circuit Court of Appeals for the Eighth Circuit in the above styled cause, you are hereby notified as follows:

I.

That the parties, through their counsel, elect to have the record printed under your supervision, and as printed, lodged in the office of the clerk for the Eighth Circuit Court of Appeals.

II.

That you will include in the record and transcript only such parts as hereby mentioned, omitting all other parts of the record, to-wit:

(1) The plaintiff's bill of complaint filed in this case on September 9, 1919, with all exhibits thereto attached.

(2) The joint and separate answer and counter claim of defendants, Bull Head Oil Company, Don Russell, J. S. Mullen, Errett Dunlap, Jake L. Hamon, and F. M. Adams, filed on October 4, 1919.

(3) Order of the court made on April 26, 1920, allowing and embodying an amendment to the sixth paragraph of the joint and separate answers of the Bull Head Oil Company, J. S. Mullen, Errett Dunlap, Jake L. Hamon, Don Russell, and F. M. Adams.

(4) Answer of defendants, T. H. Dunn and N. E. Dunn, filed on October 4, 1919.

(5) Answer of J. Robert Gillam and Mrs. J. Robert Gillam, filed October 6, 1919.

(6) Answer of defendant, E. L. McCain, filed October 9th, 1919.

(7) Answer of defendant, L. S. Dolman, filed October 5, 1919.

(8) Stipulation of counsel for a revivor of the plaintiff's case against Frank L. Ketch, administrator of the estate of Jake L. Hamon, deceased.

(9) Order of the court made on said stipulation reviving the cause.

(10) The trial judge's memorandum findings filed on October 27th, 1920.

(11) The plaintiff's motion for additional findings, filed December 7, 1920.

(12) The final decree entered at Hugo, June 6, 1921.

(13) The plaintiff's petition for appeal, assignments of error, order allowing the appeal, and citation.

(14) The defendants' petition for cross-appeal, bond, order allowing appeal, assignments of error, and citation.

(15) The narrative statement of the evidence hereto attached as Exhibit "A," and agreed upon by counsel, as per stipulation, as containing the evidence and such parts of the record as necessary for the Court of Appeals.

(16) The order extending time for return to citations.

Witness our hands and signatures this 3rd day of January, 1922.

W. A. LEDBETTER,
Special Assistant United States
Attorney, for Plaintiff.

WM. B. JOHNSON,
W. G. DAVISSON,
FRANK ADAMS,
GEO. S. RAMSEY,
Attorneys for Defendants.

Filed Jan. 3, 1922, W. V. McClure, Clerk.

Certificate of Clerk.

United States of America, Eastern District of Oklahoma—ss.

I, W. V. McClure, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the case of United States of America *vs.* T. H. Dunn, et al., in Equity, No. 2591, as was ordered by praecipe of counsel herein to be prepared and authenticated, as the same appears from the records in my office.

I further certify that the citations attached hereto, and returned herewith, are the original citations issued in this cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Muskogee, this 9th day of February, A. D. 1922.

W. V. McCLURE, Clerk,
(Seal) By WARREN BUTZ, Deputy.

253 And thereafter the following proceedings were had in cause No. 6027 in the Circuit Court of Appeals, viz:

Appearance of counsel for appellant.

United States Circuit Court of Appeals, Eighth Circuit.

UNITED STATES OF AMERICA, APPELLANT, }
vs. } No. 6027.
T. H. DUNN ET AL. }

The clerk will enter my appearance as counsel for the appellant.

WALTER A. LEDBETTER,
Special Assistant United States Attorney,
Oklahoma City, Okla.

H. L. STUART,
Oklahoma City, Okla.

R. R. BELL,
Oklahoma City, Okla.

E. P. LEDBETTER,
Oklahoma City, Okla.
Of Counsel for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 23, 1922.

254 *Appearance of counsel for appellees.*

The clerk will enter my appearance as counsel for the appellees.

GEO. S. RAMSEY,
Muskogee, Okla.
WM. B. JOHNSON,
W. G. DAVISSON,
Ardmore, Okla.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 21, 1922.

Notice of motion of appellees to dismiss.

To the Hon. W. A. Ledbetter, special assistant United States attorney, counsel for appellant:

Please take notice that on Monday, the 11th day of December, 1922, at the opening of court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the United States Circuit Court of Appeals for the Eighth Circuit for the decision of said court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with said motion in support thereof.

W. B. JOHNSON,
W.M. G. DAVISSON,

Counsel for Appellees, T. H. Dunn, N. E. Dunn, J. Robert Gillam, and Mrs. J. Robert Gillam.

STATE OF OKLAHOMA,

Oklahoma County, ss:

I, the undersigned attorney for the appellant, do hereby acknowledge service on me of a copy of the above and foregoing notice 255 with the motion therein mentioned on this the 28th day of November, 1922.

W. A. LEDBETTER,
Special Asst. U. S. Atty.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 1, 1922.

Motion of appellees to dismiss.

Now come the appellees, T. H. Dunn, N. E. Dunn, J. Robert Gillam, and Mrs. J. Robert Gillam, and move the court to dismiss the appeal herein for the following reasons, to wit:

That this action was originally brought and prosecuted in the United States District Court for the Eastern District of Oklahoma, by the appellant and against the appellees, T. H. Dunn, N. E. Dunn, Don Russell, J. Robert Gillam, Mrs. J. Robert Gillam, L. S. Dolman, Errett Dunlap, Frank L. Ketch, as administrator of the estate of Jake L. Hamon, deceased, E. L. McCain, J. S. Mullen, F. M. Adams, Bull Head Oil Company, and the First National Bank of Ardmore, Oklahoma, to cancel, set aside, and hold for naught a certain oil and gas mining lease therein mentioned, and for other relief, for the alleged reason that the defendants in said cause had wrongfully and fraudulently obtained said lease, and the benefits accruing to them thereunder, and the said cause was tried by the plaintiff in the said court on the theory that all of the said appellees were joint tort feasors and that by reason of alleged fraud and wrongdoing of the said appellees the said appellant was entitled to the relief sought in its petition.

That said cause was tried in the said United States District Court for the Eastern District of Oklahoma, and judgment was rendered in favor of all of the appellees above named on the 26th day of April, 1920. That thereafter, and long after the filing of the appeal from said judgment in this court, and to wit:

256 On or about the 6th day of September, 1921, the appellant herein entered into an agreement with all of the other appellees save and except T. H. Dunn, N. E. Dunn, J. Robert Gillam, and Mrs. J. Robert Gillam, by the terms and conditions of which the said appellees, other than these movants, paid and agreed to pay to the

appellant the sum of \$57,500.00 in full satisfaction of all claims of the appellant against the said appellees, other than these movants, and the said agreement further provided that this appeal should be no further prosecuted by the appellant against the said appellees aforesaid, other than these movants. A certified copy of the said agreement aforesaid is hereto attached, marked Exhibit "A," and made part of this motion.

Now, these movants say that inasmuch as the said appellees were liable, if at all, as joint tort feasors, that by its action in making settlement of its cause of action with the said appellees, other than these movants, the appellants' cause of action, if any, has been fully settled and wholly discharged and no right of action survives as against these movants.

These movants further show to the court that inasmuch as they do not own or hold any other or further interest in said lease except such as is represented by their stock ownership in the Bull Head Oil Company, that in collecting from said company, plaintiff has already collected from these defendants *pro rata* on the basis of all stock issued to them, and for this further and additional reason the settlement with said Bull Head Oil Company should operate as a discharge of all claims against these movants, and this motion to dismiss should be sustained.

By reason of all which these movants say that they are entitled to an order of this court dismissing this appeal.

W. B. JOHNSON,
WM. G. DAVISSON,
Attorneys for Movants.

257 STATE OF OKLAHOMA,

County of Oklahoma, ss:

I, the undersigned attorney for appellant in the above-styled and numbered cause, do hereby acknowledge service on me of a copy of the above and foregoing motion, together with appellee's brief in support thereof, on this the 28th day of November, 1922.

W. A. LEDBETTER,
Special Assistant U. S. Atty.

Exhibit "A."

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, Nov. 14, 1922.

I, E. B. Meritt, Assistant Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true copy of the original as the same appears of record in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed on the day and year first above written.

[SEAL.]

E. B. MERITT,
Assistant Commissioner.

STATE OF OKLAHOMA,
County of Carter.

Whereas on the 22d day of August, 1921, the Bull Head Oil Company, through its president, E. Dunlap, submitted to the Attorney General of the United States a certain offer to settle certain 258 matters involved in the case of the United States of America *vs.* T. H. Dunn, the Bull Head Oil Company, et al., pending in the United States District Court of the Eastern District of Oklahoma, which offer is in words and figures as follows, to wit:

Washington, D. C., Aug. 22, 1921.

The honorable, the ATTORNEY GENERAL OF THE UNITED STATES.

United States of America *vs.* T. H. Dunn et al.

Sir: Referring to the conferences which have taken place between the Bull Head Oil Company and its attorneys and the Department of Justice with reference to the settlement of certain matters involved in the above case, the Bull Head Oil Company makes the following propositions:

(1st.) That it will cause to be executed in such form as the Department of Justice or its representatives require, an assignment to the Superintendent of the Five Civilized Tribes at Muskogee, Oklahoma, of seven-sixteenths (7/16) of the oil produced from the following tract of land situated in Carter County, Oklahoma:

The south half of the northwest quarter of the southwest quarter and the west half of the southwest quarter of the southwest quarter of section four (4), township four (4) south, range three (3) west, until the full sum of \$45,000 shall have been paid; said money to belong to and become the property of Allie Daney, the beneficiary in the above filed suit, and to be deposited in the office of said Superintendent of the Five Civilized Tribes along with the other money realized

from the oils and gas lease covering the above described property and to be administered by said Superintendent of the Five Civilized Tribes in accordance with the terms and provisions of the oil and gas lease covering said premises and the rules and regulations of the Secretary of the Interior.

(2nd.) That the Bull Head Oil Company will pay to W. A. Ledbetter the sum of \$12,500 as attorney's fee for his services to date in the above filed cause. This proposition is made with the understanding that in any appeal which the United States may prosecute from the decision of United States Court for the Eastern District of Oklahoma in the above filed cause to the United States Circuit Court of Appeals or to the Supreme Court of the United States, the United States will neither ask nor insist upon a reversal of said cause or a recovery against the Bull Head Oil Company or against any of the defendants in said cause, save and except T. H. Dunn, N. E. Dunn, J. Robert Gillam, and Mrs. J. Robert Gillam, and that it will not insist upon any judgment impressing a trust upon any of the stock in Bull Head Oil Company heretofore owned by J. Robert Gillam or Mrs. J. Robert Gillam and assigned to Jake L. Hamon,

but will insist upon a money judgment against them for whatever amount the testimony may show should be awarded.

(3rd.) This proposition on behalf of the Bull Head Oil Company is made subject to ratification or authorization of its board of directors.

Respectfully,

BULL HEAD OIL COMPANY,
By (Signed) E. DUNLAP, *President.*

And, whereas, said offer of settlement has been duly ratified and confirmed by the Board of directors of the said Bull Head Oil Company, and has been accepted and approved by the Attorney General of the United States for and on behalf of the United States of 260 America, the complainant in the above styled cause, and by the Secretary of the Interior; and,

Whereas, by reason of said offer and acceptance, the said Bull Head Oil Company has become indebted to the Superintendent of the Five Civilized Tribes at Muskogee, Oklahoma, in the full sum of \$45,000.00, for the use and benefit of Allie Daney, a full blood, restricted, Choctaw Indian, and has agreed to deposit in the office of said Superintendent of the Five Civilized Tribes seven-sixteenths (7/16) of all oil produced from the following described tract of land in Carter County, Oklahoma, to wit:

The south half of the northwest quarter of the southwest quarter and the west half of the southwest quarter of the southwest quarter of section four (4), township four (4) south, range three (3) west, until said sum of \$45,000.00 shall have been fully paid, which said sum of money shall be held and administered by said Superintendent of the Five Civilized Tribes in accordance with the terms and provisions of the oil and gas lease heretofore executed by Atha N. Thomas, guardian of said Allie Daney, to T. H. Dunn and J. Robert Gillam, covering the above-described premises, and which said lease is duly recorded in the office of the county clerk of Carter County, Oklahoma, and said money shall be held in said office of the Superintendent of the Five Civilized Tribes in accordance with the rules and regulations of the Secretary of the Interior; and,

Whereas, in said offer the said Bull Head Oil Company agreed to pay W. A. Ledbetter the sum of \$12,500.00 as attorney's fees for his services in the above styled cause, to the date of said offer; and

Whereas, the said Bull Head Oil Company has paid to the said W. A. Ledbetter said sum of \$12,500.00; and

261 Whereas, Victor M. Locke is the present Superintendent of the Five Civilized Tribes at Muskogee, Oklahoma:

Now, therefore, in consideration of the premises, the said Bull Head Oil Company hereby grants, sells, transfers, and assigns unto Victor M. Locke, Superintendent of the Five Civilized Tribes, of Muskogee, Oklahoma, and his successor in office, and by these presents does grant, sell, transfer, and assign unto the said Victor M. Locke, as such Superintendent of the Five Civilized Tribes, and his successor in office, seven-sixteenths (7/16) of all oil produced from

and after August 22d, 1921, on and from said premises described as aforesaid, to wit:

The south half of the northwest quarter of the southwest quarter and the west half of the southwest quarter of the southwest quarter of section four (4), township four (4) south, range three (3) west.

And the said Bull Head Oil Company hereby covenants and agrees with the said Superintendent of the Five Civilized Tribes that it will faithfully cause to be delivered to him and to his successor in office seven-sixteenths of all oil produced from said premises, in accordance with the terms and provisions of the aforesaid oil and gas lease covering said premises, and in all respects in accordance with the rules and regulations of the Secretary of the Interior governing the operation of said lease.

The said Bull Head Oil Company further covenants and agrees that it will, at the request of the said Superintendent of the Five Civilized Tribes, execute any and all proper division orders to the end that said seven-sixteenths of the oil may be so deposited with the said Superintendent of the Five Civilized Tribes in accordance with this agreement.

In testimony whereof, the said Bull Head Oil Company has on this 6th day of September, 1921, caused these presents to be executed.

BULL HEAD OIL CO.,
262
By E. DUNLAP, President.

Attest:

F. E. STAYTON, *Secretary.*

STATE OF OKLAHOMA,

County of Carter, ss:

Before me, the undersigned, a notary public in and for said county and State, on this 6th day of September, 1921, personally appeared E. Dunlap, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its president, and acknowledged to me that he executed the same as his free and voluntary act and deed and as the free and voluntary act and deed of such corporation for the uses and purposes therein set forth.

W. M. WAIDE, *Notary Public.*

My commission expires Jan. 8th, 1924.

DEPARTMENT OF THE INTERIOR,
October 15, 1921.

Approved.

F. M. GOODWIN, *Assistant Secretary.*

Accepted.

For the Attorney General,
W. D. RITER, *Asst. Atty. Gen.*

Dated 9/22/21.

Affidavit.

STATE OF OKLAHOMA,

Carter County, ss:

J. Robert Gillam, being first duly sworn, says: I am one of the appellees named in the appeal now pending in the above-styled cause, and one of the parties on whose behalf the attached motion is filed.

Since the filing of the appeal now pending in this cause, and, 263 to wit, on or about the 6th day of September, 1921, a settlement of said cause of action was effected between the appellant and the said appellees named in said cause, with the exception of these movants, which said settlement so made was approved by the Department of the Interior on the 15th day of October, 1921; that said settlement so effected was evidenced by a written agreement and that Exhibit "A" attached to said motion is a true and correct copy of said settlement as shown by the files of the Interior Department at Washington, D. C.

And further affiant saith not.

J. ROBERT GILLAM.

Subscribed and sworn to before me, a notary public in and for Carter County and State of Oklahoma, on this the 28th day of November, 1922.

[SEAL.]

M. L. BOONE, Notary Public.

My commission expires, Jan. 21, 1925.

Ex. "B."

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 1, 1922.

Order of argument in causes Nos. 6027 and 6028

December term, 1922, Monday, December 11, 1922.

No. 6027. Appeal from the District Court of the United States for the Eastern District of Oklahoma.
 UNITED STATES OF AMERICA, APPELLANT, Appeal from the District Court of the United States for the Eastern District of Oklahoma.
 vs.
 T. H. DUNN ET AL.

and

No. 6028. Appeal from the District Court of the United States for the Eastern District of Oklahoma.
 THE BULL HEAD OIL COMPANY, A CORPORATION, ET AL., APPELLANTS, Appeal from the District Court of the United States for the Eastern District of Oklahoma.
 vs.
 UNITED STATES OF AMERICA ET AL.

264 These causes, Nos. 6027 and 6028, having been called for hearing in their regular order are argued together, and argument was commenced by Mr. W. A. Ledbetter, special assistant United States attorney, for appellant in No. 6027 and appellees in

No. 6028, continued by Mr. George S. Ramsey for appellees in No. 6027 and appellants in No. 6028, and the hour for adjournment having arrived further argument was postponed until to morrow morning.

Order of submission in causes Nos. 6027 and 6028.

December term, 1922, Tuesday, December 12, 1922.

These causes, Nos. 6027 and 6028, having been called for further hearing, argument was resumed by Mr. George S. Ramsey for appellees in No. 6027 and for appellants in No. 6028, continued by Mr. William G. Davisson on motion of appellees to dismiss in No. 6027 and on merits for appellees in No. 6027 and for appellants in No. 6028, and concluded by Mr. W. A. Ledbetter for appellant in No. 6027 and appellees in No. 6028.

Thereupon, these causes were submitted to the court on the transcript of the records from said District Court, the briefs of counsel filed herein and the motion of appellees to dismiss in No. 6027.

Opinion in causes Nos. 6027 and 6028

United States Circuit Court of Appeals, Eighth Circuit.

No. 6027.—December term, A. D. 1922.

UNITED STATES OF AMERICA, APPELLANT,
vs.
T. H. DUNN ET AL., APPELLEES. { Appeal from the District Court of the United States for the Eastern District of Oklahoma.

No. 6028.—December term, A. D. 1922.

BULL HEAD OIL COMPANY ET AL., APPEL-
lants,
v.s.
UNITED STATES OF AMERICA ET AL.,
appellees. } Appeal from the District
Court of the United
States for the Eastern
District of Oklahoma.

Mr. W. A. Ledbetter, special assistant United States attorney (Mr. Frank Lee, United States attorney, and Messrs. Ledbetter, Stuart, Bell & Ledbetter were with him on the brief), for appellant in No. 6027 and appellees in No. 6028.

Mr. George S. Ramsey and Mr. W. G. Davisson (Mr. W. B. Johnson, Mr. Edgar A. de Meules, Mr. Malcolm E. Rosser and Mr. Villard Martin were with them on the brief), for appellees in No. 6027 and appellants in No. 6028.

Before LEWIS, Circuit Judge, and POLLOCK and SYMES, District Judges.

This suit was begun in September, 1919, to cancel an oil and gas lease given to Dunn and Gillam by the guardian and the curator.

of Allie Daney, a minor full-blood Choctaw Indian. The lease bears date August 19, 1913, and was signed at that time by A. N. Thomas as guardian. In January following it was signed by J. J. Eaves as curator. Eaves had given a lease to J. S. Mullen on the forty acres and other lands belonging to the minor in August, 1913. Thomas and Eaves each claimed the right to represent the minor. Eaves had been appointed her curator by the U. S. Court for the Southern District of Indian Territory in November, 1905, and on statehood that court transmitted the curatorship record to the county court of Love County. Thomas was appointed her guardian by the county court of Leflore County in July, 1911. The county court of Love County approved the lease given by Eaves, and the county court of Leflore County the one given by Thomas. The two leases came to the Indian superintendent for his recommendation for approval by the Secretary of the Interior at about the same time, and that brought on a controversy between Dunn and Gillam and Mullen as to whether Thomas or Eaves represented the minor and had authority to give a lease. The superintendent declined to pass upon the question pressed on both sides with apparent merit, and finally recommended that the lessees in the two leases compromise the question by each taking a half interest and procuring the signature of both Thomas and Eaves to one lease. At first the parties were unable to agree, but on the superintendent's notification that he would recommend that neither lease be approved his suggestion was accepted. Oil wells were being drilled near the tract, and all interested parties realized that the land would be drained of any oil that might be under it unless it was speedily developed. Eaves then signed the lease given by Thomas. During the controversy between Dunn and Gillam and Mullen developments in the vicinity of the 40-acre tract were being made. The superintendent visited the field. He wanted the Daney land protected from drainage. He told the contending parties that it made no difference to him whether Eaves signed the Dunn and Gillam lease or Thomas signed the Mullen lease. The Bull Head Oil Company was organized and the lease assigned to it, on agreement that the lessees would take for their interest an equal amount of stock. Its capital was fixed at \$18,000. An additional five acres adjoining the tract, not belonging to the minor, was taken into the company. The lessees each took 8,000 shares and the parties who put in the adjoining five acres were compensated out of the remaining 2,000. The lease and its assignment were approved by the Secretary. Operations under the lease resulted in large production of oil. In addition to a royalty of $12\frac{1}{2}\%$ of the gross proceeds of all crude oil extracted to be paid to the minor or her representative under the Thomas lease the superintendent, after examination, concluded that \$2,000 should be exacted as a bonus for the lease, and this was paid. The complaint joined as defendants with the Bull Head Oil Co., Dunn and Gillam and their wives, Mullen and others who were stockholders in the company. It charged that the lease was

267 amount of stock. Its capital was fixed at \$18,000. An additional

five acres adjoining the tract, not belonging to the minor, was taken into the company. The lessees each took 8,000 shares and the parties who put in the adjoining five acres were compensated out of the remaining 2,000. The lease and its assignment were approved by the Secretary. Operations under the lease resulted in large production of oil. In addition to a royalty of $12\frac{1}{2}\%$ of the gross proceeds of all crude oil extracted to be paid to the minor or her representative under the Thomas lease the superintendent, after examination, concluded that \$2,000 should be exacted as a bonus for the lease, and this was paid. The complaint joined as defendants with the Bull Head Oil Co., Dunn and Gillam and their wives, Mullen and others who were stockholders in the company. It charged that the lease was

✓ voidable because, as it was alleged, Thomas, the guardian, had reserved a secret interest in it, and it not only prayed that the lease be canceled but that the defendants be held to account for all oil and gas that had been taken under it, and that the minor be adjudged to be the owner of all the company's stock. On trial the court found, and there was evidence to sustain the finding, that Thomas, under a secret agreement which he made with Dunn and Gillam, had reserved an interest in the lease. It was shown that they later paid him \$3,500 and gave him a Saxon automobile for that interest. The court, however, further found that Eaves was the minor's legal curator, that Thomas was not her guardian, and that Eaves' execution of the lease which had been theretofore signed by Thomas and its approval by the county (probate) court of Love County rendered it a valid instrument, when later approved by the Secretary. It further found that the agreement between Dunn and Gillam and Thomas constituted legal fraud on the part of defendants Dunn and Gillam, but that it was not actionable because Thomas was without authority and power to give a lease; and thereupon it dismissed the bill.

After appeal was taken the plaintiff settled the controversy with all defendants except the defendant Dunn and his wife, who had received some of the stock as a gift from her husband, and the defendant Gillam and his wife, who had received some of the stock from her husband. Appellees, Dunn and wife and Gillam and wife

268 moved to dismiss the appeal. A copy of the settlement agreement, bearing the approval of the Secretary and one of the Assistant Attorneys General accompanies the motion, from which it appears that it was made on the agreement of the Bull Head Oil Co. to pay \$45,000 to the minor and \$12,500 to plaintiff's attorneys as their fees for their services in the cause to the date of settlement, and in consideration thereof it was agreed that—"the United States will neither ask nor insist upon a reversal of said cause or a recovery against the Bull Head Oil Company or against any of the defendants in said cause, save and except T. H. Dunn, N. E. Dunn, J. Robert Gillam, and Mrs. J. Robert Gillam, and that it will not insist upon any judgment impressing a trust upon any of the stock in Bull Head Oil Company heretofore owned by J. Robert Gillam or Mrs. J. Robert Gillam and assigned to Jake L. Hamon, but will insist upon a money judgment against them for whatever amount the testimony may show should be awarded." The ground of the motion is that the cause of action was bottomed on a tort and that the settlement released all defendants from liability. Under the rule announced by this court in *Carey v. Bilby*, 129 Fed. 203 (see also *Barnett v. Conklin*, 268 Fed. 177), the motion will be overruled as to the moving appellees, but as the facts on which the motion is based are confessed the issue as to all other appellees has become moot, and as to them plaintiff's appeal is ordered dismissed.

Conceding that Thomas was the lawful guardian and the only person authorized to act in behalf of Allie Daney, and that the lease given by him to Dunn and Gillam was subject to cancellation for the fraud charged, that right in behalf of the minor could not be enforced against an innocent assignee for value. The lease was immediately assigned at the suggestion of the Indian superintendent to the Bull Head Oil Co., and the evidence does not justify a finding or conclusion that any of the parties who originally took stock in that company, nor those that have since purchased, had any knowledge of the fraudulent transaction, except Dunn and Gillam. It may also be conceded as a sound principle that Thomas can be held to account to the minor for all that he received for the secret interest which he had in the lease. The compromise and settlement made by the plaintiff through which it received \$45,000 269 for the minor, had the effect of confirming the lease; and if the plaintiff has a right now to continue the litigation against Dunn and Gillam, that right is based on their alleged fraudulent conduct, and is a claim for damages on account of the fraud. There is no testimony in the record which supports a conclusion that the Thomas lease was made for an inadequate consideration and that it did not provide fair and reasonable returns to the ward. The bonus of \$2,000 for the lease was fixed by the Indian superintendent after an examination for that purpose, both by himself and an inspector whom he sent into the field, as a reasonable amount to be paid for the privilege of obtaining the lease. Several months had passed since Thomas had executed the lease, and the situation in the field had changed. The royalties to be paid are not shown to be unreasonably low, nor that they are not fair, reasonable, and just. Up to the time of the trial the minor's estate had received in royalties \$72,515. Since the trial she has gotten \$45,000 more through compromise with the Bull Head Oil Company. If the superintendent had failed in reconciling conflicting claims under the two leases it is not at all probable, and it is not shown that anyone would have taken a lease on better terms for the minor than that given by Thomas, either from him or from Eaves. In the meantime the land would have been drained of its oil deposits. None of the defendants can be charged with the complicated dual representation of the minor. Damages are now asked against Dunn and Gillam for fraudulent participation in taking the lease from Thomas. It is an established principle that fraud without damage is not actionable, either at law or in equity, and the facts in this case do not show that the minor sustained any damage on account of the fraudulent conduct charged against Dunn and Gillam. Clarke v. White, 12 Pet. 178, 196: "In equity, as at law, fraud and injury must concur, to furnish ground for judicial action; and mere fraudulent intent, unaccompanied by any injurious act, is not the subject of judicial cognizance." Garrow v. Davis, 15 How. 272, 277: "To entitle themselves to relief,

the complainants must prove fraud and damage; or, to state the principle less abstractly, they must show that their agent disposed of what he was employed to sell, for less than its value, and that he did this fraudulently." See also *Smith v. Richards*, 13 Pet. 26;

Ming *v.* Woolfolk, 116 U. S. 559, 602; *Marshall v. Hubbard*, 270 117 U. S. 415; *Southern Development Co. v. Silva*, 125 U. S. 247, 250; *Smith v. Bowles*, 132 U. S. 125; *Angle v. Ry. Co.*, 151 U. S. 1, 10; *Sigafus v. Porter*, 179 U. S. 116; *Rockefeller v. Merritt*, 76 Fed. 909, 914; *Stratton's Independence v. Dines*, 135 Fed. 449, 458; *Pittsburgh L. & T. Co. v. Life Ins. Co.*, 140 Fed. 888, 896; *Richardson v. Lowe*, 149 Fed. 625, 633; *Pomeroy's Eq. Jur.*, vol. 6, sec. 667; *Story's Eq. Jur.*, 14th ed., vol. 1, secs. 268, 289, 290; *Bisham's Principles of Equity*, 5th ed., sec. 217. Dunn has retained his stock, Gillam disposed of his before this suit was instituted. It is argued that Dunn, as to the stock which he holds, should be declared trustee for the minor, and that Gillam should account for what he received for his shares. But the claim against each is in principle the same—damages for fraud. On plaintiff's appeal the decree is affirmed.

The lease originally made out to Dunn and Gillam, which on settlement was signed by Eaves, does not contain the name of Eaves as curator in the granting and demising clauses of the lease. There were no pleadings by any of the defendants asking the court to reform the lease in that respect, but at the time the court announced its conclusion and directed that the complaint be dismissed, the defendants in open court moved for reformation and correction, which was denied, and from that the defendants took a cross-appeal. Inasmuch as the compromise and settlement with the Bull Head Oil Co. after appeal confirmed the leasehold in it, we see no reason for its formal correction. On cross-appeal the decree is affirmed.

Filed March 28, 1923.

Decrees in causes Nos. 6027 and 6028.

United States Circuit Court of Appeals, Eighth Circuit.

December term, 1922, Wednesday, March 28, 1923.

UNITED STATES OF AMERICA, APPELLANT,
vs.T. H. DUNN, N. E. DUNN, DON RUSSELL, J. ROBERT
Gillam, Mrs. J. Robert Gillam, L. S. Dolman, Errett
Dunlap, Frank L. Ketch as administrator of the es-
tate of Jake L. Hamon, deceased, E. L. McCain,
J. S. Mullen, F. M. Adams, Bull Head Oil Com-
pany, and the First National Bank of Ardmore. } No. 6027.

and

THE BULL HEAD OIL COMPANY, A CORPORATION, J. S.
Mullen, F. M. Adams, Frank L. Ketch as adminis-
trator of the estate of Jake L. Hamon, deceased, E. L.
McCain, Don Russell, Errett Dunlap, L. S. Dolman,
T. H. Dunn, N. E. Dunn, J. Robert Gillam, and } No. 6028.
Mrs. J. Robert Gillam, appellants,
vs.UNITED STATES OF AMERICA AND THE FIRST NATIONAL
Bank of Ardmore, Oklahoma.Appeals from the District Court of the United States for the East-
ern District of Oklahoma.

These causes came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma and the motion of T. H. Dunn, N. E. Dunn, J. Robert Gillam, and Mrs. J. Robert Gillam to dismiss the appeal of the United States of America, and were argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the said motion to dismiss be, and 272 the same is hereby, overruled as to the moving appellees and as to all others made appellees to the appeal of the United States of America, being cause No. 6027, the said appeal is hereby dismissed without costs to either party in this court.

And it is further ordered, adjudged, and decreed by this court that the decree of the said District Court on the appeal of the United States, cause No. 6027, as to the appellees, T. H. Dunn, N. E. Dunn, J. Robert Gillam, and Mrs. J. Robert Gillam be, and the same is hereby, affirmed, and that on the cross appeal, cause No. 6028, the decree of the said District Court is also hereby affirmed, without costs to either party in this court.

March 28, 1923.

In the United States Circuit Court of Appeals for the Eighth Circuit.

UNITED STATES OF AMERICA, APPELLANT,
vs.

T. H. DUNN, N. E. DUNN, DON RUSSELL, J. ROBERT GILLAM, Mrs. J. Robert Gillam, L. S. Dolman, Errett Dunlap, Frank L. Ketch, as administrator of the estate of Jake L. Hamon, deceased, E. L. McCain, J. S. Mullen, F. M. Adams, Bull Head Oil Company, and the First National Bank of Ardmore, Oklahoma, appellees.

No. 6027

To the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Now comes the petitioner, to wit, United States of America, plaintiff and appellant in the above cause, and respectfully represents that it conceives itself aggrieved by the decree and judgment rendered and entered in the above numbered and entitled cause on the 28th day of March, 1923, affirming the decree of the District Court of the United States for the Eastern District of Oklahoma, in said cause.

Said plaintiff and appellant further represents that the jurisdiction of said Circuit Court of Appeals was dependent upon the fact that the United States of America was party appellant in said action suing for and in behalf of Allie Daney, a minor full-blood Choctaw Indian (the said Allie Daney being a member of the Choctaw Tribe of Indians); that said action was based on Federal questions 274 originally cognizable by a Federal Court; that the jurisdiction of the District Court of the United States for the Eastern District of Oklahoma did not depend exclusively upon diversity of citizenship; that said suit was brought in said District Court for the Eastern District of Oklahoma by United States of America under and by virtue of laws of the Congress of the United States of America, regulating the administration of the affairs of minor full-blood Choctaw Indians by the United States; that the amount involved herein and in controversy and dispute herein largely exceeds the sum of the thousand (\$10,000) dollars, exclusive of interest and costs, and this is not a case in which the jurisdiction of the Circuit Court of Appeals is made final.

Said plaintiff and appellant further respectfully represents that it desires to appeal from said decree and judgment to the Supreme Court of the United States, that said plaintiff and appellant desire and prays that said appeal to the Supreme Court of the United States be allowed by the United States Circuit Court of Appeals for the Eighth Circuit, that an order be made and entered directing that the transcript of the record and proceedings and papers upon which said decree and judgment was made and entered, duly authenticated, be sent to the United States Supreme Court of the United States,

and that an order be made and entered herein, allowing the prosecution of said appeal by said United States of America without bond.

Said plaintiff and appellant herewith submits its assignment of errors.

Wherefore, the petitioner, to wit, United States of America, plaintiff and appellant aforesaid, respectfully prays that it be allowed an appeal herein to the Supreme Court of the United States, so that this cause may be carried to the Supreme Court of the United States, and particularly prays that the transcript of the records, proceedings, and papers in this cause be sent to the United States

Supreme Court in the manner and time prescribed by law, and
275 and particularly prays that it be allowed to prosecute said appeal without bond, and prays for such other process as may be required to prosecute the appeal prayed for, to the end that the errors in said judgment and decree may be corrected.

UNITED STATES OF AMERICA,
By W. A. LEDBETTER,
Special Assistant United States Attorney.

W. A. LEDBETTER,
H. L. STUART,
R. R. BELL,
E. P. LEDBETTER,
Of Counsel.

Appeal allowed without bond. This the 23rd day of June, A. D. 1923.

KIMBROUGH STONE,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 25, 1923.

Assignment of errors on Appeal to Supreme Court, U. S.

Now comes the appellant, United States of America, by W. A. Ledbetter, special assistant United States attorney, and respectfully alleges that the following errors occurred in the proceedings on the trial and in the final decree in the above-styled cause in the District Court of the United States for the Eastern District of Oklahoma and in the United States Circuit Court of Appeals for the Eighth Circuit:

First. That the trial court erred in finding and holding that the appellant was not entitled to recover and in dismissing the appellant's bill of complaint in the court below.

Second. The trial court erred in not rendering a judgment and decree in favor of the appellant, holding illegal and void against T. H. Dunn and J. Robert Gillam the oil and gas lease dated August 18th, 1913, executed by A. N. Thomas, guardian of Allie Daney, to T. H. Dunn and J. Robert Gillam, covering the south

half of the northwest quarter of the southwest quarter and the west half of the southwest quarter of the southwest quarter of section four, township 4 south, range 3 west, in Carter County, Oklahoma, and in not rendering a decree requiring the said T. H. Dunn and his wife, Mrs. N. E. Dunn, and J. Robert Gillam and his wife, Mrs. J. Robert Gillam, to account for all monies received by them as the proceeds from oil and gas derived from the premises covered by said oil and gas lease, and as dividends on stock held by them in the Bull Head Oil Company, and in not rendering a decree holding that since the said T. H. Dunn and J. Robert Gillam assigned said oil and gas lease to the Bull Head Oil Company and since the said Bull Head Oil Company paid value therefor and became an innocent purchaser for value of said lease, the said T. H. Dunn and J. Robert Gillam were liable in damages to the appellant for the value of said lease at the date of the trial.

Third. The trial court erred in holding that the said oil and gas lease executed by A. N. Thomas, guardian, to said T. H. Dunn and J. Robert Gillam on the 18th day of August, 1913, was rendered valid and binding on the estate of said Allie Daney because of the fact that J. J. Eaves as curator of the estate of said Allie Daney, a minor, attached his signature as such curator to said oil and gas lease and acknowledged the execution of the same before a notary public, and the court erred in not holding that said oil and gas lease was illegal and void as against the said T. H. Dunn and J. Robert Gillam and their wives, Mrs. N. E. Dunn and Mrs. J. Robert Gillam, notwithstanding the fact that said J. J. Eaves as curator of the estate of said Allie Daney attached his signature to and acknowledged the execution of said lease.

277 Fourth. The trial court erred in not holding said oil and gas lease executed as aforesaid on the 18th day of August, 1913, by A. N. Thomas, guardian of Allie Daney, to T. H. Dunn and J. Robert Gillam, was illegal and void for the reason that the same was procured by the fraudulent agreement made and entered into by and between the said T. H. Dunn and J. Robert Gillam and the said A. N. Thomas, guardian of Allie Daney, whereby it was agreed that the said A. N. Thomas was to have and own for his personal and private use an undivided one-fourth interest in said oil and gas lease, which interest was agreed to be held and carried in the name of John J. Thomas, father of said A. N. Thomas; which said fraudulent agreement was further carried into effect by a subsequent arrangement whereby the interest which the said A. N. Thomas was to have and own in said oil and gas lease was reduced to a one-eighth interest in said oil and gas lease, and which said fraudulent agreement was further carried into effect by the said T. H. Dunn and J. Robert Gillam and the said A. N. Thomas in that it was agreed that when the Bull Head Oil Company, a corporation, was organized, the said T. H. Dunn should hold in his name as trustee for A. N. Thomas stock which was the equivalent of said one-

eighth interest in the oil and gas lease, and the said T. H. Dunn did hold in his name as trustee stock in the said Bull Head Oil Company of the par value of \$2,000.00 for the personal and private use and benefit of the said A. N. Thomas; and afterwards, to wit, in the months of August and September, 1915, said fraudulent agreement was finally consummated by the payment to said A. N. Thomas for his personal and private use and benefit of the sum of \$3,500.00 in money and the delivery to him of a Saxon automobile.

Fifth. Under the clear preponderance of the evidence and the finding of fact by the trial court, the said oil and gas lease was fraudulent, illegal, and void as against the said T. H. Dunn and J. Robert Gillam and their wives, Mrs. N. E. Dunn and Mrs. J. Robert Gillam, and the court erred in not rendering a judgment and decree declaring said oil and gas lease fraudulent, 278 illegal, and void as to them.

Sixth. The trial court erred in not rendering judgment in favor of plaintiff, United States of America, and against defendants, T. H. Dunn and wife, N. E. Dunn, and J. Robert Gillam and wife, Mrs. J. Robert Gillam, for the value of the oil and gas lease executed on August 18, 1913, by A. N. Thomas, as guardian of Allie Daney, to T. H. Dunn and J. Robert Gillam, in controversy in this cause, at the time of the trial of this cause.

Seventh. The trial court erred in not rendering judgment in favor of plaintiff, United States of America, and against defendants, T. H. Dunn and wife, N. E. Dunn, and J. Robert Gillam and his wife, Mrs. J. Robert Gillam, for all monies received by said four defendants, or any one or more of them, for the proceeds of oil and gas derived from the premises covered by the oil and gas lease executed by A. N. Thomas, guardian, to T. H. Dunn and J. Robert Gillam, in controversy in this cause, and on stock in the Bull Head Oil Company, received by said defendants, T. H. Dunn and wife, N. E. Dunn, and J. Robert Gillam and wife, Mrs. J. Robert Gillam, or any one or more of them.

Eighth. The trial court erred in not holding that T. H. Dunn and N. E. Dunn hold the stock issued to them in the Bull Head Oil Company as trustees for the benefit of the appellant and in not decreeing the sale thereof for the use and benefit of the appellant, United States of America.

Ninth. The United States Circuit Court of Appeals erred in affirming the final decree of the trial court, and in holding that the appellant, United States of America, was not entitled to recover judgment against the appellees, T. H. Dunn and his wife, N. E. Dunn, and J. Robert Gillam and his wife, Mrs. J. Robert Gillam.

Tenth. The United States Circuit Court of Appeals erred in dismissing the appellant's appeal as to the Bull Head Oil Company and the other appellees herein other than the appellees 279 T. H. Dunn and his wife, N. E. Dunn, and J. Robert Gillam and his wife, Mrs. J. Robert Gillam.

Eleventh. The United States Circuit Court of Appeals erred in considering the recitals in the motion to dismiss of T. H. Dunn and his wife, N. E. Dunn, and J. Robert Gillam and his wife, *N. E. Dunn and J. Robert Gillam and his wife* Mrs. J. Robert Gillam, on the merits of the case, and erred in taking into consideration the recitals in said motion in determining the case on its merits, for the reason that the motion to dismiss the appeal constituted no part of the record proper on appeal, and the United States Circuit Court of Appeals was not authorized, under the law, to consider the recitals in the motion to dismiss appeal when determining the merits of the controversy.

Twelfth. The United States Circuit Court of Appeals erred in holding that the compromise settlement between the United States and the Bull Head Oil Company had the effect of confirming the lease in controversy.

Thirteenth. The United States Circuit Court of Appeals erred in holding that the lease in controversy was executed for a full and adequate consideration and in holding that the estate of Allie Daney, a ward of the Government, for whom this suit is prosecuted, was not damaged or injured by reason of the fraud perpetrated by T. H. Dunn and J. Robert Gillam in procuring the lease from A. N. Thomas, guardian of Allie Daney.

Fourteenth. The United States Circuit Court of Appeals erred in holding that the fraud perpetrated by T. H. Dunn and J. Robert Gillam in procuring the execution of the lease by A. N. Thomas, guardian, did not vitiate the lease as to T. H. Dunn and J. Robert

Gillam and their wives, and rendered the same null and void.

280 Fifteenth. The evidence in the case having conclusively shown that the lease executed by A. N. Thomas, guardian, on or about August 18th, 1913, to T. H. Dunn and J. Robert Gillam was procured by fraudulent means, in that T. H. Dunn, representing himself and J. Robert Gillam, made an agreement with A. N. Thomas, guardian, by which he, A. N. Thomas, was to have and hold a secret and private interest in the lease, consisting of an undivided one-fourth interest therein, and that by agreement between the parties said interest was reduced so that the said A. N. Thomas was to have for his private and personal use an undivided one-eighth interest in the lease, and said fraudulent agreement having been carried into execution when the oil and gas lease was assigned to the Bull Head Oil Company, and said T. H. Dunn having taken and held in his name as trustee 2,000 shares of the stock of the Bull Head Oil Company for the use and benefit of the said A. N. Thomas, and said fraudulent agreement having been further executed in the months of August and September, 1915, when the said Dunn and Gillam purchased the interest of the said A. N. Thomas in the stock so held in the name of T. H. Dunn as trustee, and having paid A. N. Thomas therefor the sum of \$3,500.00 in money and given him a Saxon automobile, the United States Circuit Court of Appeals erred

in not holding that said oil and gas lease was illegal and void in so far as T. H. Dunn and J. Robert Gillam and their wives are concerned.

Sixteenth. The United States Circuit Court of Appeals erred in not holding that at the time J. J. Eaves, as curator, signed the oil and gas lease executed by A. N. Thomas, guardian, the lease had a rental value of from four to six hundred dollars an acre and the aggregate lease value of from sixteen thousand to twenty-four thousand dollars, and not holding that the mere attaching of the name of J. J. Eaves, curator, to the lease executed by Thomas and the approval of the lease by the county court of Love County and the

Secretary of Interior did not validate the lease, and in not 281 holding that the lease having been obtained by fraud and the fraud having been in no way extracted or condoned, the lease was at all times null and void in so far as T. H. Dunn and J. Robert Gillam and their wives are concerned, and in not holding that the said T. H. Dunn and J. Robert Gillam are liable in damages for the fraud perpetrated by them in procuring the lease, and in not holding them subject to accounting for the value of the lease at the time of the trial in the court below.

Seventeenth. The United States Circuit Court of Appeals erred in not holding that the lease as executed by A. N. Thomas, guardian, and signed by J. J. Eaves, curator, was void under the laws of the State of Oklahoma, for the reason that the same was not offered for sale under circumstances which would permit competitive bidding, and for the reason the said lease and all the terms and provisions thereof were fully agreed upon when the same was presented to the county judge of Le Flore County and the county judge of Le Flore County and county judge and county court of Love County approved the same in the form in which the same was presented, and that there was no competitive bidding authorized or permitted at the time said oil and gas lease was approved.

Eighteenth. The United States Circuit Court of Appeals erred in not reversing the decree rendered in said cause in the court below, and in not holding that said oil and gas lease was void as to said T. H. Dunn and J. Robert Gillam and their wives, and in not holding the said T. H. Dunn and J. Robert Gillam liable in damages to the estate of said Allie Daney to the extent of the value of the oil and gas lease at the time of the trial.

Wherefore, the appellant, United States of America, prays that the judgment of the United States District Court for the Eastern District of Oklahoma, in so far as it denied any relief against said T. H. Dunn and his wife and J. Robert Gillam and his wife, be reversed, set aside, and held for naught, and that the judgment and decree of the United States Circuit Court of Appeals for the 282 Eighth Circuit affirming said judgment be reversed, and that the proper judgment be rendered by the Supreme Court of the United States, and that the United States Circuit Court of Ap-

peals and the said United States District Court for the Eastern District of Oklahoma be directed to render a proper judgment in the premises.

UNITED STATES OF AMERICA,
By W. A. LEDBETTER,
Special Assistant United States Attorney.

W. A. LEDBETTER,
H. L. STUART,
R. R. BELL,
E. P. LEDBETTER,
Of counsel.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 25, 1923.

283 *Affidavit as to amount in controversy.*

I, W. A. Ledbetter, special assistant United States attorney for plaintiff and appellant in the above entitled and numbered cause, do oath state that the amount in controversy and in dispute in the above cause exceeds ten thousand (\$10,000.00).

W. A. LEDBETTER.

Subscribed and sworn to before me by the said W. A. Ledbetter on this the 22nd day of June, 1923.

[SEAL.] BEATRICE COOK, *Notary Public.*

My commission expires July 6, 1925.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 25, 1923.

Order allowing appeal, without bond, to Supreme Court, U. S.

On this the 23rd day of June, A. D. 1923, at Kansas City, Mo., in the Western Division of the Western District of the State of Missouri, came on to be heard the petition of United States of America, plaintiff and appellant in the above numbered and entitled cause, said petition asking for an appeal herein from the judgment, decision, and decree rendered by the United States Circuit Court of Appeals for the Eighth Circuit on the 28th day of March, 1923, said petition being presented at said Kansas City, Missouri, to the undersigned judge of the United States Circuit Court of Appeals for the Eighth Circuit, said petition also asking that an order be made and entered allowing said appeal without bond or security.

Said petitioner, to wit, said United States of America, also submitted to me its assignments of error.

Said petition for such appeal is allowed.

284 It is therefore ordered, adjudged, and decreed that said petition for such appeal be, and the same is hereby, allowed as prayed for, and it is further ordered, adjudged, and decreed that

said appeal be allowed to be prosecuted by said United States of America without bond or security.

KIMBROUGH STONE,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 25, 1923.

285 In the United States Circuit Court of Appeals for the Eighth Circuit:

UNITED STATES OF AMERICA, APPELLANT,

vs.

T. H. DUNN, N. E. DUNN, DON RUSSELL, J. ROBERT Gillam, Mrs. J. Robert Gillam, L. S. Dolman, Errett Dunlap, Frank L. Ketch, as administrator of the estate of Jake L. Hamon, deceased, E. L. McCain, J. S. Mullen, F. M. Adams, Bull Head Oil Company, and the First National Bank of Ardmore, appellees. No. 6027.

Citation.

United States of America to T. H. Dunn, N. E. Dunn, Don Russell, J. Robert Gillam, Mrs. J. Robert Gillam, L. S. Dolman, Errett Dunlap, Frank L. Ketch, as administrator of the estate of Jake L. Hamon, deceased, E. L. McCain, J. S. Mullen, F. M. Adams, Bull Head Oil Company, and the First National Bank of Ardmore, greeting:

You and each of you are hereby notified that in a certain cause in the United States Circuit Court of Appeals for the Eighth Circuit, being number 6027, wherein United States of America is appellant and T. H. Dunn, N. E. Dunn, Don Russell, J. Robert Gillam, Mrs. J. Robert Gillam, L. S. Dolman, Errett Dunlap, Frank L. Ketch, as administrator of the estate of Jake L. Hamon, deceased, E. L. McCain, J. S. Mullen, F. M. Adams, Bull Head Oil Company, and the First National Bank of Ardmore are appellees, an appeal has been allowed said appellant, United States of America, to the Supreme Court of the United States.

You and each of you are therefore cited and admonished to be and appear before the said Supreme Court of the United States, at the city of Washington, D. C., thirty days after the date of this 286 citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Kimbrough Stone, judge of the United States Circuit Court of Appeals for the Eighth Circuit, on this the 23rd day of June, A. D. 1923.

KIMBROUGH STONE,
Judge United States Circuit Court of Appeals for the Eighth Circuit.

STATE OF OKLAHOMA,

Oklahoma County, 88:

On this the 2nd day of July, 1923, personally appeared before the undersigned notary public W. A. Ledbetter, who being sworn says: That on the 28th day of June, 1923, he delivered a copy of the within citation to F. M. Adams, one of the appellees therein named, and that on the 29th day of June, 1923, he delivered a copy of said citation to Charles L. Anderson, president of the First National Bank of Ardmore, Oklahoma, one of the appellees therein named, and that on the same day he delivered a copy of said citation to W. G. Davisson, solicitor for J. Robert Gillam and Mrs. J. Robert Gillam, who are also appellees in the within cause, and he likewise on the same day delivered a copy of said citation to Hugh W. McGill, of the law firm of Johnson & McGill, solicitors for T. H. Dunn and his wife, N. E. Dunn, appellees in said cause.

W. A. LEDBETTER

Subscribed and sworn to before me on this the 2nd day of July, 1923.

[SEAL.]

BEATRICE COOK,

Notary Public, Oklahoma County, Okla.

My commission expires July 6, 1925.

(Endorsed:) Filed Jul. 3. E. E. Koch, clerk.

287 In the United States Circuit Court of Appeals for the Eighth Circuit.

UNITED STATES OF AMERICA, APPELLANT, }
vs. } No. 6027.
T. H. DUNN ET AL., APPELLEES. }

Acknowledgment of service of citation.

I, Geo. S. Ramsey, solicitor for Bull Head Oil Company, do hereby acknowledge service of the citation issued on the 23rd day of June, 1923, by Honorable Kimbrough Stone in the above cause.

GEO. S. RAMSEY.

288 In the United States Circuit Court of Appeals for the Eighth Circuit.

UNITED STATES OF AMERICA, APPELLANT, }
vs. } No. 6027.
T. H. DUNN ET AL., APPELLEES. }

Acknowledgment of service of citation.

I, Errett Dunlap, one of the appellees in the above styled cause, hereby accept service of copy of the citation issued in said cause on

the 23rd day of June, 1923, by Honorable Kimbrough Stone, judge of the United States Circuit Court of Appeals for the Eighth Circuit.

ERRETT DUNLAP.

289 In the United States Circuit Court of Appeals for the Eighth Circuit.

UNITED STATES OF AMERICA, APPELLANT,
vs.
T. H. DUNN ET AL, APPELLEES. } No. 6027.

Acknowledgment of service of citation.

I, L. S. Dolman, one of the appellees in the above styled cause, hereby accept service of copy of the citation issued in said cause on the 23rd day of June, 1923, by Honorable Kimbrough Stone, judge of the United States Circuit Court of Appeals for the Eighth Circuit.

This the 3rd day of July, 1923.

L. S. DOLMAN.

290 In the United States Circuit Court of Appeals for the Eighth Circuit.

UNITED STATES OF AMERICA, APPELLANT,
vs.
T. H. DUNN ET AL, APPELLEES. } No. 6027.

I, Fred R. Ellis, attorney for Georgae Hamon Rohrer, administratrix of the estate of Jake L. Hamon, deceased, hereby enter appearance in said cause, and acknowledge service of copy of the citation issued on the 23rd day of June, 1923, by Honorable Kimbrough Stone, judge of the United States Circuit Court of Appeals for the Eighth Circuit.

Dated the 5th day of July, 1923.

FRED R. ELLIS.

(Endorsed:) Filed Jul. 7, 1923. E. E. Koch, clerk.

291 *Clerk's certificate.*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma as prepared, printed, and certified by the clerk of said District Court to the United States Circuit Court of Appeals in pursuance of an act of

Congress approved February 13, 1911, in certain causes wherein the United States of America was appellant and T. H. Dunn et al. were appellees, No. 6027, and wherein the Bull Head Oil Company et al. were appellants, and the United States of America et al. were appellees, No. 6028, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in cause No. 6027, United States of America, appellant, *v.* T. H. Dunn et al., as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation, affidavit of service, and acknowledgments of service are hereto attached and herewith returned, on the appeal in cause No. 6027.

I do further certify that on the first day of June, A. D. 1923, a mandate was issued out of said Circuit Court of Appeals 292 in said causes, directed to the judges of the District Court of the United States for the Eastern District of Oklahoma.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this fourteenth day of July, A. D. 1923.

[SEAL.]

E. E. KOCH,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

(Indorsement on cover:) File No. 29,750. U. S. Circuit Court Appeals, 8th Circuit. Term No. 440. The United States of America, appellant, *vs.* T. H. Dunn, N. E. Dunn, Don Russell, et al. Filed July 18th, 1923. File No. 29,750.

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IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1924.

No. 120.

THE UNITED STATES OF AMERICA, *Appellant,*
vs.
T. H. DUNN, N. E. DUNN, DON RUSSELL, *ET AL.,*
Appellees.

**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.**

BRIEF on BEHALF of APPELLANT.

Nature and Result of the Action.

This is an appeal by the United States from a decree rendered by the United States Circuit Court of Appeals for the Eighth Circuit on March 28, 1923, affirming a decree entered in the case by the United States Court for the Eastern District of Oklahoma on June 7, 1921, dismissing plaintiff's bill of complaint.

The action was originally filed on the 9th day of September, 1919, in the latter court under direction of the Attorney General and at the request of the Secretary of the Interior. The purpose of the suit was to set aside an oil and gas lease executed on the 19th day of August, 1913, by A. N. Thomas, guardian of Allie Daney, a full-blood Choctaw Indian minor, to T. H. Dunn and J. Robert Gillam, covering a 40-acre tract of land in the Healdton oil field in Carter County, Oklahoma.

It was alleged in the bill of complaint that the land was a part of the restricted allotment of the Indian minor and was reserved by law from alienation and encumbrance, and that the proceeds from oil and gas produced from the premises were also reserved from alienation and encumbrance by the allottee or her guardian, except by the consent of the Secretary of Interior, and that the funds derived from oil and gas produced therefrom were required by law to be deposited in the office of the Superintendent of the Five Civilized Tribes for the use and benefit of the allottee; that A. N. Thomas was appointed guardian of the minor, Allie Daney, on the 24th day of July, 1911, by the County Court of Le-Flore County, in the State of Oklahoma, and that the lease was recorded in the office of the county clerk of Carter County, Oklahoma, in the month of February, 1914, and that about the same time an assignment of the lease from T. H. Dunn and J. Rob-

ert Gillam to the Bull Head Oil Company was also recorded in the office of the clerk of that court. It was alleged that the lease had been procured by fraud, and that therefore it and the assignment thereof to the Bull Head Oil Company were illegal and void for the reasons hereinafter more fully set forth. (Copy of lease, Trans. 16-24; Assignment, Trans. 24-25.)

T. H. Dunn and his wife, N. E. Dunn, J. Robert Gillam and his wife, Mrs. J. Robert Gillam, Don Russell, L. S. Dolman, Erret Dunlap, Jake L. Hamon, J. S. Mullen, E. L. McCain, F. M. Adams and the Bull Head Oil Company were made defendants in the action and an accounting against them was sought for the proceeds of the oil and gas taken from the leased premises, and in the alternative it was prayed that if for any reason the court should hold that the lease could not be cancelled, then that the defendant's stockholders in the Bull Head Oil Company be adjudged to hold the stock in trust for Allie Daney, and Allie Daney be declared to be the rightful owner thereof, and that the plaintiff be awarded the custody thereof for her use and benefit; that the Bull Head Oil Company be required to account for all the oil and gas taken from the said premises and for the proceeds thereof, and that the other defendants who are or at any time have been stockholders in the Bull Head Oil Company be required to account for all moneys received by them

respectively, either as dividends or as proceeds of the sale of their stock.

It was alleged that the fraud which entered into the procurement and execution of the oil and gas lease consisted of an agreement entered into by the guardian, A. N. Thomas, as lessor, and T. H. Dunn and J. Robert Gillam as lessees, by which the oil and gas lease was to be taken in the name of T. H. Dunn and J. Robert Gillam, but that they should hold for the personal and private use and benefit of A. N. Thomas, the guardian, an undivided one-fourth interest in the lease, the agreement in this particular being verbal and covered up and secretly held and carried in a written contract in the name of J. J. Thomas, who was the father of A. N. Thomas; that A. N. Funkhouser, Earl McGowen, and D. Thomas, an uncle of A. N. Thomas, were to have and hold jointly an undivided one-fourth interest therein, and that an agreement in writing to that effect was entered into by them with the defendants, T. H. Dunn and J. Robert Gillam; that it was agreed that T. H. Dunn and J. Robert Gillam should organize a corporation to be known as the Bull Head Oil Company with a capital stock of \$18,000.00, one-fourth of which after setting aside \$2000.00 worth of the stock to other parties as hereinafter explained, should be issued to J. J. Thomas for the sole use and benefit of the guardian, A. N. Thomas, and one-half of the capital stock was to be issued to T. H. Dunn and J.

Robert Gillam, and one-fourth should be issued to Funkhouser, D. Thomas and McGowen; that the said Funkhouser, A. N. Thomas, Earl McGowen, D. Thomas and J. J. Thomas never paid anything of value to the said A. N. Thomas, as guardian of Allie Daney, for the interests which they were to receive in the oil and gas lease, nor for the stock of the Bull Head Oil Company, and that said agreement between A. N. Thomas, Funkhouser, T. H. Dunn, J. Robert Gillam, J. J. Thomas, Earl McGowen and D. Thomas was illegal and fraudulent, and was made for the purpose of cheating and defrauding the minor, Allie Daney, out of her rights in and to said oil and gas lease and premises, and that said oil and gas lease, on account of said fraudulent agreement, is fraudulent, illegal and void; that a part of the agreement resulting in the execution of the oil and gas lease was that application should be made to the county judge of LeFlore County for an order to sell the lease to T. H. Dunn and J. Robert Gillam, and for an order approving the sale thereof, and that the county judge and County Court of LeFlore County should not be informed of the terms, conditions and provisions of said agreement or the secret interests which the said Funkhouser, McGowen, J. J. Thomas, D. Thomas and A. N. Thomas were to have and hold in the same, or in the capital stock of said corporation after it was organized, and that in accordance with such agreement T. H. Dunn and A. N. Thomas made application to the

county judge and County Court of LeFlore County, Oklahoma, for authority to the guardian to execute the oil and gas lease to Dunn and Gillam, and that the county judge and County Court of LeFlore County did authorize said A. N. Thomas, as guardian of Allie Daney, to execute the same, and after the execution of the same by A. N. Thomas, the county judge and County Court made an order approving it; that in granting authority for the execution of the lease and approving the same, the county judge and County Court of LeFlore County were uninformed as to the secret agreement by which the above named parties were to have and hold an interest in and to said lease and in and to the capital stock of said corporation, but all such information was concealed and withheld from said county judge and County Court by the said A. N. Thomas and T. H. Dunn. It was alleged that the concealment of such secret agreement from the county judge and County Court constituted a fraud upon the county judge and County Court and rendered the action of said county judge and County Court in authorizing the execution of said lease and the approval of the same, illegal and void. That immediately thereafter the said T. H. Dunn, J. Robert Gillam, and A. N. Thomas, as guardian of the said Allie Daney, caused the lease to be presented to Dana H. Kelsey, United States Indian Superintendent at Muskogee, Oklahoma, for his consideration, and for the purpose of having the same transmitted to and approved by the

Secretary of the Interior; that valid orders of the county judge and County Court of LeFlore County authorizing the execution of the lease and the approval thereof by the county judge and County Court were legal prerequisites to the consideration and approval of the same by the Indian Superintendent and Seeretary of Interior. That as a part of their application for the approval of the oil and gas lease and in conformity with the rules and regulations of the Secretary of Interior, the said T. H. Dunn and J. Robert Gillam made under oath, among others, the following statement:

“The applicant solemnly swears that the lease, for which approval is requested, is taken in good faith in the interest and for the exclusive benefit of the applicant, and not for speculation or transfer, or as agent for, or in the interest or for the benefit of, any other person, corporation or association; that no other person, corporation, or association has any interest, present or prospective, directly or indirectly, therein.”

That the Superintendent, not being otherwise informed, believed the statements thus made under oath to be true, and acting thereon, recommended the approval of the lease, and that the Secretary of the Interior and his assistant, Lewis C. Laylen, not being otherwise informed, believed said statement under oath and relying thereon approved the lease; that the concealment by the guardian, A. N. Thomas, and T. H. Dunn and J. Robert Gillam from the Indian

Superintendent and from the Secretary of Interior of the secret interests held by A. N. Thomas and the other parties above mentioned in said lease, and the making under oath of the above statement, constituted a fraud upon said Indian Superintendent and upon the Secretary of the Interior, and rendered the approval of the lease illegal and void.

It was further alleged that the said guardian, A. N. Thomas, could have made a much more valuable lease for the use and benefit of said minor, Alie Daney, and could have procured for her a bonus of at least \$10,000.00 for the lease.

That in connection with the application for the approval of the lease by the Secretary of Interior, the said T. H. Dunn and J. Robert Gillam presented to the Indian Superintendent an assignment of the lease to the Bull Head Oil Company, which assignment was in due time approved by the Secretary of Interior, but at the time he approved the same he had no knowledge of the fraudulent agreement above mentioned by which the guardian, A. N. Thomas, and others were to have and hold undivided interests in the lease or in the stock of the Bull Head Oil Company, and that the concealment of the facts as above set forth from the Secretary of Interior, which rendered the procurement and execution of the lease fraudulent, illegal and void, also rendered the approval of the assignment by him illegal and void.

It was also alleged that on that same day A. N. Thomas, as guardian, executed the lease to T. H. Dunn and J. Robert Gillam, J. J. Eaves of Ardmore who had on the 8th day of November, 1905, been appointed curator of the minor Allie Daney by the United States Court for the Indian Territory, executed in favor of J. S. Mullen an oil and gas lease covering the same tract of land; that J. S. Mullen presented the lease executed by Eaves as curator, to the United States Indian Superintendent at Muskogee, Oklahoma; that the presentation of this lease to the Indian Superintendent, while the other lease was pending before him, resulted in a contest before the Indian Superintendent as to which of said leases should be approved; that after the organization of the Bull Head Oil Company the respective lessees effected a compromise agreement, as a result of which J. S. Mullen withdrew his application for the approval of the lease executed by J. J. Eaves as curator, so far as the land embraced in the lease executed by A. N. Thomas was concerned, and the said Mullen subsequently abandoned the said lease to himself, and requested that the same be disapproved by the Secretary of Interior, which was accordingly done, and that the said J. J. Eaves as curator also executed the A. N. Thomas lease; and it was further alleged that no consideration or agreement was paid to the said J. J. Eaves as curator for his joining in the execution of the lease executed by A. N. Thomas, and that his signature as such curator to said

lease was wholly illegal and void, but notwithstanding the void character of such act on the part of said J. J. Eaves, the same was made the basis of an agreement on the part of the Bull Head Oil Company and the said T. H. Dunn and J. Robert Gillam, who controlled said corporation on the one hand and J. S. Mullen on the other, whereby 8000 shares of the capital stock of said corporation was to be issued to the said J. S. Mullen and his associates; that pursuant to the illegal agreement which resulted in the procurement and execution of the lease by A. N. Thomas to T. H. Dunn and J. Robert Gillam, and pursuant to the illegal agreement between the Bull Head Oil Company, T. H. Dunn, J. Robert Gillam and J. S. Mullen, the capital stock of the Bull Head Oil Company was issued as follows: To J. W. Gladney 1000 shares, in consideration of an oil and gas lease covering a five acre tract of land not connected in any way with the Allie Daney land; to J. S. Mullen for himself and associates, 8000 shares; to T. H. Dunn, trustee, 8000 shares; to L. S. Dolman, 1000 shares; that of the stock issued to T. H. Dunn as trustee, certain shares were later transferred as follows, to-wit: To N. E. Dunn 1500 shares; to T. H. Dunn 500 shares; to J. Robert Gillam 2000 shares; to Earl McGowen 666-2/3 shares; to A. N. Funkhouser 666-2/3 shares; to T. H. Dunn, trustee for D. Thomas 666-2/3 shares; to T. H. Dunn, trustee for J. J. Thomas and A. N. Thomas 2000 shares; that in the latter part of the year 1914, T. H. Dunn and J. Robert

Gillam bought 2000 shares of said capital stock held by T. H. Dunn, trustee for J. J. Thomas and A. N. Thomas, and as consideration therefor, in addition to cash paid and an automobile delivered to said A. N. Thomas they caused a deed to a tract of 200 acres of land in Carter County, Oklahoma, to be made to P. C. Dings, who secured a loan thereon, the proceeds of which were paid to A. N. Thomas, and who thereafter conveyed the land to J. J. Thomas to be held for A. N. Thomas. (The bill of complaint is set out in full at pages 1-16 of transcript.)

The different defendants answered denying all the allegations in the bill of complaint charging fraud in the execution and procurement of the lease, or any knowledge of the fraud, and owing to the fact that the evidence tended strongly to show, and the trial court held, that all of the defendants except T. H. Dunn and his wife and J. Robert Gillam and his wife were innocent purchasers of the lease and of the stock in the Bull Head Oil Company, it will not be necessary to consider their answers in detail, but T. H. Dunn and his wife and J. Robert Gillam and his wife set up certain affirmative defenses which it is necessary to consider. They alleged that the lease in controversy was procured for them by A. N. Funkhouser, and that if any fraud was perpetrated it was perpetrated by him without their knowledge or consent, that it was agreed between them and Funkhouser that if a lease was procured by him from

A. N. Thomas, guardian of Allie Daney, on the tract of land in controversy it should be taken in their name, but that they would hold for his use and benefit an undivided one-half interest in the lease and that he had the right to do as he pleased with this undivided one-half interest, that if A. N. Thomas and D. Thomas and Earl McGowen had any interest in the lease it was by reason of an agreement between them and A. N. Funkhouser of which Dunn and Gil-lam had no knowledge, and they alleged in substance that the same arrangement with respect to the stock in the Bull Head Oil Company was made, as it was agreed that that company should be organized and that any interest which A. N. Thomas and the other parties named had in the stock of the Bull Head Company was the result of the agreement with Funkhouser in dealing with his undivided one-half interest in the lease. They also alleged that the sale of the lease was regularly made by the County Judge of LeFlore County and that they were the highest bidders therefor, and the lease was sold them and approved by the County Judge, and that no fraud of any character known to them was perpetrated to procure the lease or its approval; that after the lease was procured they presented the same to Dana H. Kelsey, United States Indian Superintendent, for approval by the Secretary of Interior. They also alleged that on the same day the lease was executed by A. N. Thomas, another lease was executed by J. J. Eaves, curator of the estate of Allie Daney

on the same tract of land to J. S. Mullen, which lease was executed according to law and upon blank forms provided by the Secretary of Interior and was duly presented to Dana H. Kelsey, United States Indian Superintendent, that T. H. Dunn and J. Robert Gillam and Mullen were notified by Kelsey of the conflict between the leases, and a hearing was had to determine which should be approved, that Kelsey decided that he would reject both leases unless the parties agreed among themselves as to which should have the lease; that he would not recommend either lease for approval unless both the guardian and curator executed the same, and that unless an additional bonus of \$2,000.00 was paid by the lessees, that Dunn and Gillam and Mullen finally reached an agreement by which a corporation was organized known as the Bull Head Oil Company with a capital stock of \$18,000.00 and that either lease would be recommended for approval if it was executed by both guardian and curator and the \$2,000.00 bonus paid, and the lessees in said lease should transfer their interest in the same to the corporation, that all of this was done and a lease held by J. S. Mullen on five acres of land was also assigned to the corporation; that J. J. Eaves was and had been for a long time curator of the estate of Allie Daney, legally appointed and qualified, and was such when the said Thomas was appointed guardian, and that he remained curator after Oklahoma was admitted into the Union, and

until he resigned, which was after the execution of the lease.

Dunn and Gillam further alleged that on the 27th day of January, 1924, Dana H. Kelsey, Indian Superintendent, recommended that the lease and the assignment thereof to the Bull Head Oil Company, executed by Thomas, guardian, and Eaves, curator, be approved by the Secretary of the Interior (Tr. 45-49).

The defendants J. Robert Gillam and his wife also set up substantially the same affirmative defenses as were set up by Dunn and his wife (Tr. 49-52).

Evidence in Trial Court.

On the trial of the case which was begun on the 26th day of April, 1920, the evidence overwhelmingly sustained the allegations of fraud in the procurement and execution of the lease. The guardian A. N. Thomas who was a witness for the plaintiff testified fully, giving the details of the fraudulent arrangement by which he made an agreement with T. H. Dunn, acting for himself and his partner J. Robert Gillam, in which he was to receive an undivided one-fourth interest in the lease for his personal and private benefit and that his interest in the lease was to be covered up in a written agreement and carried in the name of his father J. J. Thomas, that later the interest which he was to have in the

lease was by parole agreement with Dunn reduced from one-fourth to one-eighth, and when the Bull Head Oil Company was organized the agreement was further executed by T. H. Dunn and J. Robert Gillam in an arrangement by which 2000 shares of the capital stock of the Bull Head Oil Company of the par value of \$1.00 per share was held in the name of T. H. Dunn for the personal and private benefit of the guardian A. N. Thomas, and that later in the months of August and September, 1915, the fraudulent arrangement was consummated by the payment to him by Dunn and Gillam of \$3500.00 in money and the delivery to him of a Saxon automobile.

The testimony of other witnesses corroborated this testimony in every particular, and owing to the fact that the trial judge in his findings of fact sustained all the allegations in the bill of complaint with reference to the fraudulent procurement and execution of the lease, and owing to the further fact that the United States Circuit Court of Appeals agreed with the trial court as to the fraud which entered into the procurement and execution of the lease, we do not deem it necessary to quote or discuss the testimony in further detail. We content ourselves by setting out in full the rather elaborate findings of fact which were filed in the court below by Judge WILLIAMS.

Findings of Fact by the Trial Court.

On the 20th day of October, 1920, Judge Williams filed in his court, what he designated as "Memorandum of Finding," which is set forth in full at pages 65 to 70 of the transcript. After stating that the action was brought to set aside an oil and gas lease on the ground of fraud, the lease covering forty acres of land belonging to Allie Daney, a full-blood Choctaw Indian, the judge found that on the 8th day of November, 1905, J. J. Eaves was appointed curator of the estate of Allie Daney by the United States Court for the Southern District of the Indian Territory sitting in probate, and that after the erection of the State of Oklahoma, the curatorship proceedings were duly transferred to Love County, Oklahoma, and that Eaves as curator, on the 18th day of August, 1913, executed an oil and gas lease to J. S. Mullen covering the forty acre tract of land belonging to the minor and presented the lease to Dana H. Kelsey, Superintendent of the Five Civilized Tribes, for approval. That on the 24th day of July, 1911, A. N. Thomas, was appointed guardian of the minor, Allie Daney, by the County Court of LeFlore County, Oklahoma, and that he immediately qualified and entered upon the discharge of his duties as such guardian and at the time of the institution of this suit he was acting as such guardian. That on the 18th day of August, 1913, A. N. Thomas as such guardian, executed an

oil and gas lease to T. H. Dunn and J. Robert Gillam covering the same tract of land.

Judge Williams found as a part of the consideration moving to A. N. Thomas to execute the lease to T. H. Dunn and J. Robert Gillam, T. H. Dunn transferred to J. J. Thomas, for the use and benefit of A. N. Thomas, an undivided one-fourth interest in the oil and gas lease, or in writing agreed that J. J. Thomas should have such interest and it was a secret understanding that it should be for the personal benefit of A. N. Thomas, and that T. H. Dunn and J. Robert Gillam also agreed in writing that Earl McGowan, D. Thomas and A. N. Funkhouser should also have an undivided one-fourth interest in the lease. The remaining one-half interest in the lease was to be held and owned by T. H. Dunn and J. Robert Gillam. That the lease executed by Thomas to Dunn and Gillam was also filed with Dana H. Kelsey, Superintendent for the Five Civilized Tribes, for approval but that he declined to approve either of the leases as long as there was controversy as to who was the *de jure* guardian of the estate of Allie Daney. He also found that Dana H. Kelsey, acting as Superintendent for the Five Civilized Tribes, suggested to the holders of the respective leases that they organize a corporation and call it the Bull Head Oil Company, the holders of the respective leases each to have one-half of the stock of the company, and that J. J. Eaves as curator of the estate of Al-

lie Daney join in the lease executed or to be executed by A. N. Thomas, and that after the lease was appraised and its bonus value ascertained and paid, that he would approve the lease so executed and assigned to the Bull Head Oil Company for whatever bonus was determined by such appraisement to be paid. He found that this plan was carried out by the parties and that an additional five acres, known as the Gladney tract, was added to the Allie Daney tract and its value included in the stock of the company at \$2,000.00 and that the Allie Daney lease was valued at \$16,000.00, making the total capital stock of the company \$18,000.00. That the holders of the original lease from J. J. Eaves as curator, otherwise known as the Mullen interest, were to receive and did receive \$8,000.00 of the capital stock of the Bull Head Oil Company, and the holders of the original A. N. Thomas lease, otherwise referred to as the Dunn and Gillam interest, were to and did receive \$8,000.00 of the capital stock of the company. L. S. Dolman and Gladney each received \$1,000.00 of the original stock of the company, represented by the additional five acre lease referred to above. The stock of the Mullen interest was issued to J. S. Mullen, Errett Dunlap and L. S. Dolman and the stock was represented by the Dunn and Gillam interest was issued to T. H. Dunn, as trustee. That prior to this arrangement T. H. Dunn had conferred with A. N. Thomas, J. J. Thomas, McGowan, D. Thomas and Funkhouser and explained to them the neces-

sity of reducing their holdings on account of the arrangement suggested by Kelsey and in accordance with the negotiations which brought about the approval of the lease, so that in place of Thomas having a one-fourth interest, it would be a one-eighth interest, and the same arrangement was made by Dunn as to the one-fourth interest of Funkhouser, McGowan and D. Thomas. That afterwards T. H. Dunn and J. Robert Gillam acquired the interest held in the name of J. J. Thomas, the transaction being negotiated and concluded with A. N. Thomas and the D. Thomas and Earl McGowan interest in the stock was sold to Dunlap. Afterwards J. Robert Gillam sold his holdings in the stock of the company to Jake Hamon for \$75,000.00, representing 3,266-2/3 shares, of which his wife, Mrs. Gillam, at that time held 1,266-2/3 shares. That the defendant, T. H. Dunn, still has his holdings in the company. At the time of the negotiations which brought about the transfer of the Allie Daney lease executed by A. N. Thomas, guardian, and later joined in by J. J. Eaves as curator, neither J. J. Eaves as guardian, Frank Adams, Errett Dunlap, L. S. Dolman, J. W. Gladney nor any of the holders of the original J. J. Eaves curator lease knew of any secret agreement on the part of Dunn and Gillam by which A. N. Thomas, as guardian, secured or was to secure any interest in or private benefit from the lease, nor did they have any knowledge or information that would have rea-

sonably put them on inquiry so as to ascertain such fact.

Judge Williams also held that E. L. McClain acquired the interest of A. N. Funkhouser in the stock of the company for a valuable consideration and without notice that A. N. Thomas, guardian, or J. J. Thomas or D. Thomas had or claimed any interest in the lease, and that Jake Hamon had no notice of such claim at the time he purchased for value the stock of J. Robert Gillam.

Judge Williams also found that at the time the lease was executed by J. J. Eaves, as curator, he was the regular guardian of Allie Daney's estate and that when he joined in the A. N. Thomas lease, having first been specifically authorized to that end by the County Court or probate court of Love County, Oklahoma, he was the regular guardian of her estate and that his act in joining in the lease executed by A. N. Thomas placed the oil and gas legal title in Dunn and Gillam, to be transferred to the Bull Head Oil Company subject to the approval of the lease by the Secretary of the Interior. That this had the effect of putting the oil and gas legal title in the Bull Head Oil Company, free from the legal effect of fraud in the execution of the lease by A. N. Thomas, as guardian, for he was not *de jure* guardian of the estate of Allie Daney. That while from the fair preponderance of the evidence he found there was legal fraud in the execution of the original

lease by A. N. Thomas as guardian to Dunn and Gillam by the placing of an interest in J. J. Thomas' name for the personal and private benefit of A. N. Thomas, yet he found that J. J. Eaves was the legal guardian of her estate and that the lease executed by him was the valid lease and when he joined in this Thomas lease that carried the oil and gas legal title when it had been approved by the County or Probate Court of Love County and afterwards approved by the Secretary of the Interior, that that had the effect of placing the oil and gas legal title in the Bull Head Oil Company free from fraud.

The findings thus made did not cover all the issues made by the pleadings and the evidence and the attorneys for the plaintiff on December 7th, 1920, filed in the trial court a motion asking the judge to make additional findings and in response to that motion Judge Williams, as a part of the final decree in the case, on June 7, 1921, made additional findings of fact which are set forth in the transcript at pages 76 to 77, inclusive.

The first additional fact which he found was that T. H. Dunn held in his name as trustee, shares of stock in the Bull Head Oil Company of the par value of \$2,000.00 for the personal and private benefit of A. N. Thomas from the time the original stock of the company was issued until some time in the year 1915, at which time he, Dunn, and J. Robert Gillam, purchased the same from A. N. Thomas and

paid him therefor the sum of \$3,500.00 in money and a Saxon automobile. He also found that at the time Kelsey suggested the formation of the Bull Head Oil Company and recommended the approval of the oil and gas lease executed by A. N. Thomas as guardian and joined in by J. J. Eaves as curator, he, Kelsey, had no knowledge of the agreement between T. H. Dunn, A. N. Thomas, D. Thomas, A. N. Funkhouser and Earl McGowan, by which they were to have personal and private benefits in the lease nor did Kelsey, at the time he recommended the approval of the lease have any knowledge of such agreement whereby A. N. Thomas, D. Thomas, A. N. Funkhouser and Earl McGowan were to have any interest in the stock of the Bull Head Oil Company after its organization, nor did the county judge of Love County have any knowledge of any such secret agreement at the time he directed J. J. Eaves as curator to join in the lease.

He further found that when J. J. Eaves as curator of the estate of Allie Daney, on or about the 26th day of January, 1914, subscribed his name to the oil and gas lease as of date of August 19, 1913, by A. N. Thomas as guardian to Dunn and Gillam, it was the intention that J. J. Eaves should so execute the lease in joining therein as to execute a valid oil and gas lease and that the then present intention in so executing it, after it was approved by the County Court of Love County and the Secretary of

the Interior, was to make it a binding oil and gas lease on the estate of Allie Daney and that the execution by J. J. Eaves as curator and the approval by the county judge of Love County and by the Secretary of the Interior, was free from fraud and the same operated to make the lease a valid lease, said lease being for a term of ten years from the date of the approval by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities. He also found that Dunn at the time of the trial was solvent. That he was unable to determine from the evidence whether J. Robert Gillam was solvent or not and that the stock transferred by Gillam to his wife was without consideration (Tr., pp. 76-77).

In the Circuit Court of Appeals none of the defendants in error seriously denied the allegations of fraud in the procurement of the leases. In that court, the plaintiff, United States, conceded that the Bull Head Oil Company and all of the stockholders of that company, except T. H. Dunn and his wife and J. Robert Gillam and his wife, were innocent purchasers of the lease and of the stock in that company, and sought to recover in lieu of the cancellation of the lease, a money judgment against Dunn and Gillam and their wives for the value of the lease at the time of the trial, and particularly to recover against J. Robert Gillam and his wife judgment for the sum of

\$75,000.00, which sum had been paid them for their stock in the company.

The Circuit Court of Appeals, as stated above, agreed with the trial court that the lease had been procured by fraud. On that point Judge LEWIS, who wrote the opinion, said:

“On the trial the court found, and there was evidence to sustain the finding, that Thomas, under a secret agreement which he made with Dunn and Gillam, had preserved an interest in the lease. It was shown that they later paid him \$3,500 and gave him a Saxon automobile for that interest.

“The court, however, further found that Eaves was the minor's legal curator, that Thomas was not her guardian, and that Eaves' execution of the lease which had been theretofore signed by Thomas and its approval by the County (probate) Court of Love County rendered it a valid instrument, when later approved by the Secretary. It further found that the agreement between Dunn and Gillman and Thomas constituted legal fraud on the part of defendants, Dunn and Gillam, but that it was not actionable because Thomas was without authority and power to give a lease; and thereupon it dismissed the bill.” (Tr. 262.)

After assuming that the lease had been procured by fraud, the Circuit Court of Appeals affirmed the judgment of the court below upon the theory that the fraud was not actionable, because in the opinion of that court the testimony did not show that the fraud injured the estate of the minor.

S P E C I F I C A T I O N S *of* E R R O R .

We present the case to this court upon eighteen specifications of error, which are fully set forth at pages 267 to 272 of the transcript.

In the first, second, third, fourth, fifth, sixth, seventh and eighth specifications, we complain of the action of the trial court. These specifications are in substance that the trial court erred in holding that the appellant, the United States of America, was not entitled to recover and in dismissing its bill of complaint and in not rendering a decree in favor of the appellant holding illegal and void as against T. H. Dunn and J. Robert Gillam the oil and gas lease dated August 18, 1913, executed by A. N. Thomas, guardian of Allie Daney, and in not rendering a decree requiring T. H. Dunn and his wife, M. E. Dunn, and J. Robert Gillam and his wife, Mrs. J. Robert Gillam, to account for all moneys received by them as proceeds from the oil and gas derived from the premises covered by the oil and gas lease, and as dividends on stock held by them in the Bull Head Oil Company and in not rendering a decree holding that since Dunn and Gillam assigned the lease to the Bull Head Oil Company and since the Bull Head Oil Company paid value therefor and became an innocent purchaser of the lease, that Dunn and Gillam were liable in damages for the value of the lease at the time of trial.

That the trial court erred in holding that the lease was rendered valid and binding on the estate of Allie Daney because J. J. Eaves, as curator of the estate of Allie Daney, attached his signature as such curator to the lease and acknowledged the execution of the same before a notary public and in not holding that the oil and gas lease was illegal and void as against T. H. Dunn and J. Robert Gillam and their wives, notwithstanding the fact that J. J. Eaves, as curator of the estate of Allie Daney attached his signature to and acknowledged the same.

That the trial court erred in not holding the oil and gas lease illegal and void for the reason that the same was procured by the fraudulent agreement entered into by and between T. H. Dunn and J. Robert Gillam and A. N. Thomas, guardian of Allie Daney, whereby it was agreed that A. N. Thomas was to have and hold for his personal and private use an undivided one-fourth interest in the lease, which interest was agreed to be held and carried in the name of J. J. Thomas, father of A. N. Thomas, and which fraudulent agreement was further carried into effect by a subsequent arrangement whereby the interest of A. N. Thomas was reduced to a one-eighth interest in the oil and gas lease and which fraudulent agreement was further carried into effect by T. H. Dunn and J. Robert Gillam and A. N. Thomas in that it was agreed that the Bull Head Oil Company when organized, T. H. Dunn should hold in his name

as trustee for A. N. Thomas, stock which was the equivalent of the one-eighth interest in the oil and gas lease and that T. H. Dunn did hold in his name as trustee stock in the company of the par value of \$2,000.00 for the personal and private use and benefit of A. N. Thomas, and that afterwards, to-wit, in the months of August and September, 1915, the fraudulent agreement was finally consummated by the payment to A. N. Thomas for his personal and private use and benefit, the sum of \$3,500.00 in money and a Saxon automobile.

That the trial court also erred in not rendering judgment in favor of the United States against Dunn and Gillam and their wives for all moneys received by them or any of them for the proceeds of oil and gas derived from the premises covered by the lease and also dividends on stock of the Bull Head Oil Company received by them or any of them and that the trial court erred in not holding that T. H. Dunn and his wife held the stock issued to them in the Bull Head Oil Company as trustees, for the benefit of the United States of America, and in not decreeing the sale thereof for the use and benefit of the United States of America.

In the ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth specifications of error we complain of the action of the United States Circuit Court of Appeals in dismissing the appellants' appeal as to the Bull

Head Oil Company and the other appellees other than T. H. Dunn and his wife, M. E. Dunn, and J. Robert Gillam and his wife, Mrs. J. Robert Gillam, and that the Circuit Court of Appeals erred in considering the recitals in the motions of T. H. Dunn and his wife, M. E. Dunn, and J. Robert Gillam and his wife, Mrs. J. Robert Gillam, to dismiss the appeal herein on the merits of the case, and erred in taking into consideration the recitals in said motions in determining the case on its merits, for the reason that the motion to dismiss the appeal constituted no part of the record proper and the United States Circuit Court of Appeals was not authorized under the law to consider the recitals in said motion to dismiss the appeal when determining the merits of the controversy, and that that court erred in holding that the compromise settlement between the United States and the Bull Head Oil Company had the effect of confirming the oil and gas lease in controversy; that that court erred in holding that the lease was executed for a full and adequate consideration and that the estate of Allie Daney, for whom this suit was brought, was not damaged or injured by reason of the fraud perpetrated by Dunn and Gillam in procuring the lease from her guardian and in not holding that the fraud perpetrated by them vitiated the lease as to Dunn and Gillam and their wives and rendered the same null and void. That the evidence having conclusively shown that the lease executed by A. N. Thomas on the 18th day of August,

1913, to T. H. Dunn and J. Robert Gillam was procured by fraudulent means in that it was agreed that A. N. Thomas, the guardian, was to have and to hold a secret and private interest in the lease, consisting first of a one-fourth interest, which subsequently was reduced to a one-eighth interest, which fraudulent agreement was carried into execution when the Bull Head Oil Company was formed and T. H. Dunn held in his name as trustee two thousand shares of stock of said company for the use and benefit of Thomas and was further executed in the months of August and September, 1915, when Dunn and Gillam purchased the interest of A. N. Thomas in the stock of the company and paid A. N. Thomas therefor \$3,500.00 in money and gave him a Saxon automobile, the United States Circuit Court of Appeals erred in not holding the lease illegal and void insofar as T. H. Dunn and J. Robert Gillam and their wives are concerned. That court also erred in not holding at the time J. J. Eaves as curator, signed the oil and gas lease executed by A. N. Thomas, the lease had a rental value of from four to six hundred dollars an acre and the aggregate lease value of from sixteen to twenty-four thousand dollars and in not holding that the mere attaching of the name of J. J. Eaves as curator to the lease executed by A. N. Thomas and the approval of the lease by the County Court of Love County and the Secretary of the Interior did not validate the lease and in not holding that the lease having been procured by fraud and the fraud

not having been extracted therefrom or condoned, the lease was at all times null and void insofar as T. H. Dunn and J. Robert Gillam and their wives are concerned and in not holding that T. H. Dunn and J. Robert Gillam were liable in damages for the fraud perpetrated by them in procuring the lease and in not holding them subject to an accounting for the value of the lease at the time of the trial in the court below, and that the United States Circuit Court of Appeals erred in not reversing the decree of the court below.

PRELIMINARY STATEMENT.

After the trial court had held that the Bull Head Oil Company was an innocent purchaser for value of the oil and gas lease in controversy and that all the stockholders of that company except Dunn and Gillam and their wives were innocent purchasers of the stock, the Bull Head Oil Company on the 22nd day of August, 1921, submitted in writing to the Attorney General, an offer of compromise in which it offered to turn over to the Superintendent of the Five Civilized Tribes seven-sixteenths of the oil produced from the lease until the full sum of \$45,000.00 was paid, the money to become the property of Allie Daney, the beneficiary of the suit, and to be deposited in the office of the Superintendent of the Five Civilized Tribes along with other money realized from the premises, and in addition thereto to pay attorney's fees in the sum of \$12,500.00. This offer of compromise was subject to the following condition:

“This proposition is made with the understanding that in any appeal which the United States may prosecute from the decision of United States Court for the Eastern District of Oklahoma in the above filed cause to the United States Circuit Court of Appeals or to the Supreme Court of the United States, the United States will neither ask nor insist upon a reversal of said cause or a recovery against the Bull

Head Oil Company or against any of the defendants in said cause, save and except T. H. Dunn, N. E. Dunn, J. Robert Gillam, and Mrs. J. Robert Gillam, and that it will not insist upon any judgment impressing a trust upon any of the stock in Bull Head Oil Company heretofore owned by J. Robert Gillam or Mrs. J. Robert Gillam and assigned to Jake L. Hamon, but will insist upon a money judgment against them for whatever amount the testimony may show should be awarded" (Tr. 256-257).

The offer was approved by the Attorney General, and the Interior Department, the compromise has in all respects been carried into effect, and the money paid into the office of the Superintendent of the Five Civilized Tribes for the benefit of the minor.

The rights of the Bull Head Oil Company and its stockholders other than Dunn and Gillam and their wives, in view of the compromise, are not involved in this appeal.

In the sixth, seventh and eighth assignments of error on appeal to the United States Circuit Court of Appeals error is charged because the court did not render judgment against T. H. Dunn and his wife N. E. Dunn and J. Robert Gillam and his wife Mrs. J. Robert Gillam, but no relief is sought against the Bull Head Oil Company and its other stockholders. The only relief sought on this appeal to the Supreme Court of the United States is against

Dunn and Gillam and their wives (Tr. 241-244 and 271).

No compromise with Dunn and Gillam could be justified. The overwhelming weight of the evidence and the findings of the trial court concurred in by the Circuit Court of Appeals show that on the 19th day of August, 1913, they entered into a corrupt agreement with A. N. Thomas the guardian of the Indian minor who is a ward not only of A. N. Thomas, but also of the United States, by which they bribed him to execute an oil and gas lease on a tract of land belonging to the ward. This agreement was continuously in the minds of the parties from that time until in the months of August and September, 1915, when it was consummated and the bribe, consisting of \$3500.00 in money and a Saxon automobile, was paid. The uncontradicted evidence shows that but for this corrupt agreement a bonus of from sixteen thousand to twenty-four thousand dollars could have been obtained for the lease; whereas, on account of the corrupt agreement and the complications resulting therefrom, only a bonus of \$2070.00 was obtained.

The government owes a most solemn duty to protect thousands of Indian minors in Oklahoma, in the administration of their estates involving many millions of dollars, and every consideration of right, justice and public policy forbids compromise with persons who, by fraud, induce the guardians of such

wards to betray their trusts. On the other hand the government is under a pressing duty and obligation to expose fraud of all kinds when perpetrated in connection with the administration of such trusts.

The record in this case shows that Dunn and Gillam were the active perpetrators of the fraud, and that by the decree of the courts below they have been permitted to profit by their fraud to the extent of approximately two hundred thousand dollars.

The government insists that Dunn and Gillam, occupying as they do a fiduciary relation to the estate of the minor, should not be permitted to thus profit by their fraud, and that they should be held to a full accounting for all profits made by them out of this transaction. It will be noted that the trial court held the original lease executed by A. N. Thomas to Dunn and Gillam on August 19, 1913, illegal and void upon the theory that the appointment of Thomas as guardian was unauthorized by law; but that the lease became valid and was rendered *free of fraud* by the fact that J. J. Eaves curator of the estate of Allie Daney attached his name to the lease on January 26, 1914 (Tr. 69 and 77). The Circuit Court of Appeals however held the lease valid because the fraud perpetrated by Dunn and Gillam was of no detriment to the estate of the minor and therefore not actionable (Tr. 263-264).

Contest before the Indian Superintendent between Dunn and Gillam holding lease executed by A. N. Thomas, guardian of Allie Daney, and J. S. Mullen holding lease executed by J. J. Eaves, curator of Allie Daney. (Tr. 169.)

It appears that on the 19th day of August, 1913, shortly after oil was discovered in Carter County, Oklahoma, J. S. Mullen, at Marietta, Love County, Oklahoma, procured an oil and gas lease from J. J. Eaves curator of the estate of Allie Daney, and that on the same day Dunn and Gillam procured a lease from A. N. Thomas, the guardian, at Poteau, Le-Flore County, Oklahoma. These two leases were promptly presented to the Indian Superintendent Kelsey for transmission to the Secretary of Interior for approval. Thereupon a protracted scramble began before the Indian Superintendent (Tr. 104-5 and 169 to 198, also 199-205). Neither lease was of any validity whatever until approved by the Secretary of the Interior.

Section 2 of the Act of May 27, 1908 (35 Stat. 312), is the sole authority for the execution of the lease in controversy, and it provides in substance that leases on restricted lands of Indian minors for oil, gas or other mining purposes may be made by their guardians "*with the approval of the Secretary of Interior under rules and regulations provided by the Secretary and not otherwise*" (*Jackson v. Gates Oil Company*, 297 Fed. 549).

This scramble resulted in a compromise in the month of January, 1914, between those holding under the Thomas lease and those holding under the Eaves lease, by which an additional bonus of \$2,000.00 was to be paid out of oil produced from the premises, and a corporation was to be organized with a capital stock of \$18,000.00, \$16,000.00 of which was to be divided equally between the respective factions engaged in the scramble (see testimony of Indian Superintendent, Kelsey, Tr. 216). It was also agreed that J. J. Eaves should join in the execution of the lease previously executed by Thomas, and then resign his curatorship; and that the lease should be assigned to the Bull Head Oil Company.

The undisputed testimony of Frank Adams (Tr. 160), Erret Dunlap (Tr. 164) and P. C. Dings (Tr. 158) is that the land at that time had a lease or bonus value of from four to six hundred dollars an acre, or an aggregate lease or bonus value of from sixteen to twenty-four thousand dollars. The testimony of J. S. Mullen with reference to value of the lease is significant. He says:

“I know what the departmental lease on the Allie Daney land was worth the latter part of January, 1914; it was worth about the capital stock of the company, that is, about \$18,000.00” (Tr. 161-162).

We cannot read the evidence with reference to the contest before the Indian Superintendent and

the compromise made under his direction, and escape the conclusion that with the consent of the Superintendent, the parties to the compromise *appropriated the lease or bonus value of this minor's land in January, 1914, to their own use and benefit, and made it the basis for the issuance of the capital stock of the Bull Head Oil Company*—one-half to the Mullen faction and the other one-half to the Dunn and Gillam faction. In fact they boldly stipulated in writing to the effect that *in consideration of the assignment of the unapproved lease to the Bull Head Oil Company "stock shall be issued to the party of first part or such person as he may designate (the Mullen faction) in the amount of \$8,000.00, and to the parties of second part, or such persons as they may designate (the Dunn and Gillam faction) stock in the amount of \$8,000.00"* (Tr. 135-136).

At the time the estate of the minor was thus despoiled of the bonus value of the lease to the extent of sixteen thousand dollars' worth of the capital stock of the Bull Head Oil Company, neither Mullen nor Dunn and Gillam, holding under the respective unapproved leases, had any legal right to have the leases approved. All the Indian Superintendent had to do was to recommend the rejection of both leases and then the officers of the state and federal governments could certainly have so managed this estate as to procure for the minor an oil and gas lease with an adequate bonus. We desire to emphasize the

point that at the time this compromise was made, the estate of the minor was in no way bound, and neither Mullen nor Dunn and Gillam had any right whatever in an oil and gas lease; and that none of the parties to the transaction paid anything for the stock except to procure the assignment of this unapproved lease to the company.

In the findings of fact and conclusions of law reached by the trial judge, great stress seems to have been put on the fact that Mullen had this unapproved curator's lease and surrendered it and accepted in lieu thereof 8000 shares of the capital stock of the company. Dunn and Gillam contend that this fact aided and protected them against a decree holding the lease void and calling on them for an accounting. We most earnestly protest against the contention that this Eaves lease, unapproved and rejected at the request of Mullen, ought to have any consideration whatever in determining the validity of the other lease executed by A. N. Thomas and joined in by Eaves the curator.

ARGUMENT and AUTHORITIES.

FIRST PROPOSITION.

The oil and gas lease in controversy having been executed under a fraudulent agreement by which the guardian, A. N. Thomas, and his uncle, D. Thomas, and others were to have and own a secret interest in the lease for their personal and private use and benefit, and this agreement having been executed, the lease is fraudulent and void in so far as T. H. Dunn and J. Robert Gillam, who actively participated in the fraudulent agreement, are concerned. This proposition arising under the first, second, ninth and eighteenth errors assigned wherein complaint is made generally against the trial court for dismissing the bill and against its action in not holding the oil and gas lease void, and also against the Circuit Court of Appeals for affirming the decree of dismissal and in not reversing the case on appeal to that court.

The statutes of Oklahoma prohibit a guardian from purchasing at his own sale his ward's property. Such a purchase as between the ward and the guardian is void. It is also void as against all other persons dealing with the property with knowledge of the fraud. Judge WILLIAMS expressly found that a part of the consideration moving to A. N. Thomas to execute the lease, Dunn and Gillam, by T. H. Dunn, transferred to J. J. Thomas for the use

and benefit of A. N. Thomas, an undivided one-fourth interest in the oil and gas lease, or in writing agreed that J. J. Thomas should have such interest and it was a secret understanding that it should be for the personal benefit of A. N. Thomas; that the assignment of this interest to J. J. Thomas for the use and benefit of A. N. Thomas was executed at the same time the lease was executed and was a part of the same transaction.

It thus appears that the lease was executed upon an unlawful consideration.

Section 5521 of the Compiled Laws 1921 reads as follows:

“The consideration of a contract must be lawful.”

This subject is fully discussed in the case of *Mann v. Brady*, ... Okl. ..., 196 Pac. 346, where it is said:

“Where the consideration of a contract is in part illegal, the courts as a general rule, will not determine how much of the consideration is based on the illegal consideration and enforce the contract as to the balance; but the whole contract will be deemed illegal; and enforcement thereof wholly refused.” *Chicago, I. & L. Ry. Co. v. Southern Indiana Ry. Co.*, (Ind. App.) 70 N. E. 843.”

Section 1305 of the Revised Laws of Oklahoma 1921, reads as follows:

“No executor or administrator must directly or indirectly, purchase any property of

the estate he represents, nor must he be interested in any sale."

Section 1478 of the Revised Laws of Oklahoma 1921, reads as follows:

"All the proceedings under petition of guardians for sales of property of their wards, giving notice and the hearing of such petitions, granting and refusing an order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale and application for confirmation thereof, notice of hearing and such application, making orders, rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts must be had and made as provided and required by the provisions of law concerning the estates of decedents unless otherwise specifically provided herein."

In *Allison v. Crummey*, 166 Pac. 691, the Supreme Court held, that section 1478 makes the law regulating sales by executors and administrators applicable to sales by guardians, and a guardian cannot directly or indirectly purchase any property of his wards, nor can he be interested in any sale thereof.

In the case of *Winsted v. Shank*, 173 Pac. 1041, the Supreme Court held that a guardian cannot directly or indirectly purchase any property belonging to his ward, nor can he be interested in any sale thereof.

In the body of the opinion it is said:

“In the case of *Burton v. Compton*, 150 Pac. 1080, it is held that where a guardian sells his ward's real estate to his wife, the deed is void regardless of the absence of fraud, or price, or the apparent irregularity of the proceeding. The statute (sections 6409 and 6566) prohibits the guardian from being interested in any sale of his ward's real estate.”

In the case of *Burton v. Compton*, 150 Pac. 1080, it is said:

“And our statute (section 6409, Revised Laws 1910) says: ‘No executor or administrator must directly or indirectly purchase any property of the estate he represents, nor must he be interested in any sale.’ But the defendant (plaintiff in error) insists that this transaction was free from fraud, and that the price paid was adequate. That might all be true in this particular case, but the law looks beyond the circumstances of any individual case; for as said in *Frazier v. Jenkins*, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575: ‘The opportunities which are open to an unlawful trustee to advantage himself out of the trust estate are so many and so tempting and the condition of the beneficiary in the trust ordinarily so helpless and confiding, that the law gives warning in advance against all transactions out of which it is possible for the former to make gain at the expense of the latter.’

“And for this reason the legislature has fixed this statutory rule which removes both the temptation and opportunity to do wrong. And the courts can make no distinction in the application of the rule between the honest and the

dishonest. And whether that transaction be free from fraud or not, is immaterial to the issue in the case. It is a transaction prohibited by the statute and condemned by public policy."

The record here presents a case of the worst possible kind of fraud entered into by the guardian of the minor with the lessees. The guardian was bribed by the lessees to execute the lease. The trial court expressly found that the consideration for the lease was the fraudulent consideration received by the guardian. The lease therefore at its inception was impregnated with corruption, and the corruption participated in by both the guardian and the lessees continued to operate on their minds and control their conduct from the date of the lease on the 19th day of August, 1913, until the months of August and September, 1915, when the fraudulent arrangement was finally consummated and the guardian was paid by the lessees \$3500.00 in money and a Saxon automobile. Such a lease is condemned by every principle of the common law and of equity as well as by the positive provisions of the Oklahoma statutes above mentioned as elucidated by the decisions cited. We invite special attention to the rule announced in those decisions, that such a lease is void even in the absence of fraud, because it is prohibited by the plain provisions of the statute.

SECOND PROPOSITION.

The fact that Dunn and Gillam, lessees, and A. N. Thomas, guardian, concealed from the county judge and County Court of LeFlore County the secret agreement by which A. N. Thomas, the guardian, D. Thomas, Earl McGowen and A. N. Funkhouser were to have an interest in the lease and in the stock of the Bull Head Oil Company, constituted fraud upon the court and rendered the approval of the lease, in so far as Dunn and Gillam are concerned, illegal and void; and the concealment of the personal and private interests of A. N. Thomas, D. Thomas, Earl McGowen and A. N. Funkhouser from Dana H. Kelsey, United States Indian Superintendent, and the Secretary of Interior, likewise constituted fraud on those officers and rendered the lease illegal and void.

We need but call the attention of the court to the following cases on this proposition to show that such concealment of fraud by the guardian and the lessees rendered the lease illegal and void:

Barnsdall v. Owen, 200 Fed. 519;

Mandler v. Rains, . . Okl. . ., 174 Pac. 240;

Anicker v. Gunsberg, 226 Fed. 178.

It is apparent from the findings of fact by Judge WILLIAMS that he would have held the oil and gas lease void if it had not been for the defenses set up by Dunn and Gillam in which it was contended that A. N. Thomas was not the guardian of Allie Daney,

and that his appointment as guardian in 1911 by the County Court of LeFlore County, Oklahoma, was void, because in 1905 J. J. Eaves had been appointed by the United States Court for the Southern District of the Indian Territory curator of the estate of Allie Daney, and that he continued to be such curator after statehood, and that when he executed the lease on January 24, 1914, the fraud which had entered into the original procurement and execution of the lease by Thomas was in some way extracted; and it is also apparent that the Circuit Court of Appeals would have held the lease void by reason of the fraud which entered into its procurement and execution except for the fact that that court concluded that the estate of the minor was in no way injured by the fraud, and therefore it was not actionable.

THIRD PROPOSITION.

This proposition is set forth in the third assignment of error, and that is that the trial court erred in holding that the oil and gas lease executed by A. N. Thomas, guardian, to T. H. Dunn and J. Robert Gillam on the 19th day of August, 1913, was rendered valid and binding on the estate of the minor, Allie Daney, because J. J. Eaves, as curator of the estate of Allie Daney, attached his signature to the oil and gas lease and acknowledged the execution of the same before a notary public, and the

court erred in not holding that the lease was illegal and void as against the said T. H. Dunn and J. Robert Gillam and their wives, notwithstanding the fact that J. J. Eaves, as curator of the estate of Allie Daney, attached his signature to and acknowledged the execution of the lease.

The lease in controversy is set out in full at pages 16 to 22 of the transcript. It is in regular form and bears date of August 19, 1913. The name of A. N. Thomas, guardian of Allie Daney, appears therein as a party grantor, and no other name is contained in the lease as grantor. J. J. Eaves, the curator, in no way connects himself with the operative or granting terms of the lease. On the 26th day of January thereafter he annexed his signature to the lease by signing it "J. J. Eaves, Curator of Allie Daney" (Tr. 159), and on the same day he acknowledged it at Ardmore, Oklahoma, before F. M. Adams, notary public (Tr. 22 and Tr. 159). It appears at pages 234, 235 and 236 of transcript that on the 26th day of January, 1914, J. J. Eaves applied to the County Court of Love County, Oklahoma, for permission to execute an oil and gas lease on the land in controversy and on that date that court made an order reciting that it appearing to the court that on the 19th day of August, 1913, one A. N. Thomas as guardian of Allie Daney a minor, executed an oil and gas lease upon the lands described in the petition under orders of the County Court of LeFlore County,

which lease was approved by that court on the same day, to T. H. Dunn and J. Robert Gillam, and

“It appearing further that the execution of another lease upon said lands to other persons would be detrimental to the interests of said minor;

“Now, therefore, it is ordered by the court that J. J. Eaves, as curator of the estate of Allie Daney, join in said lease to T. H. Dunn and J. Robert Gillam, by the execution, in proper form, of the same oil and gas lease heretofore executed by said A. N. Thomas.”

On the same day J. J. Eaves reported to the court that he had joined in the execution of the Thomas lease and the court on that day made an order approving the lease, which order is in words and figures as follows, to-wit:

“Now, upon this 26 day of January, 1914, came on to be heard the report of J. J. Eaves, curator of the estate of Allie Daney, a minor, showing that upon the 26th day of January, 1914, said J. J. Eaves, as said curator, joined in the execution of an oil and gas mining lease, under forms prescribed by the Department of the Interior, dated August 19, 1913, to T. H. Dunn and J. Robert Gillam, upon the following described land, to-wit:

S2 of NW4 of SW4 and W2 of SW4 of SW4 of section 4, township 4 south, range 3 west;

and the court being fully advised in the premises, and believing it to be for the best interest of said minor;

"It is therefore, ordered by the court that said oil and gas lease executed on the 19th day of August, 1913, by A. N. Thomas, guardian, to T. H. Dunn and J. Robert Gillam, and executed on the 26 day of January, 1914, by J. J. Eaves as curator of Allie Daney, be and the same is hereby, in all things approved and confirmed" (Tr. 235-236).

It thus appears that while the County Court of Love County might have intended for J. J. Eaves, curator, to execute the lease in due and proper form and thereby make it a binding lease so far as he as curator was concerned, he did not do so. His name does not appear in the body of the lease. He merely attached his signature to the lease below the names of the parties, A. N. Thomas as guardian, and T. H. Dunn and J. Robert Gillam as lessees, who had executed and acknowledged the lease on the preceding 19th day of August. He assumed no responsibility with respect to that lease. He in no way connected himself with any granting clause in the lease, and we submit that what he did, failed to give the lease any force or effect whatever so far as J. J. Eaves curator of the estate of Allie Daney was concerned. Nor can it be said that J. J. Eaves intended to execute a valid curator's lease, because on the 9th day of January, 1914, which was fifteen days before he attached his signature to the Thomas lease, it was agreed that he should resign as curator (Tr. 135). He never exercised any dominion or control over

the leased premises and never collected any of the royalty or bonus money. He was discharged as curator on the 12th day of September, 1924 (Tr. 239).

The Interior Department, through the Indian Superintendent, never recognized Eaves in connection with the lease in any way whatever.

On the trial it was stipulated that:

"It is conceded by the defendants that after the compromise agreement under which the Bull Head Oil Company was organized and the lease from Thomas, guardian, to Dunn and Gillam was signed by Eaves, curator, Mullen requested that the lease executed by Eaves, curator, to him (Mullen, and shown by plaintiff's Exhibit 23) be disapproved, and that it was disapproved so far as the land in controversy is concerned, and that therefore Eaves as curator had nothing further to do with the oil and gas lease or the royalties collected therefrom, and that from and after the approval of the lease executed by A. N. Thomas, as guardian, and Eaves as curator, Thomas has been recognized as the guardian of Allie Daney in all matters connected with the operation of the lease" (Tr. 105-106).

All J. J. Eaves ever did in connection with this lease was to apply to the County Court of Love County for permission to execute it and procure from that court an order authorizing him to join in it after having attached his signature to it and acknowledged it.

The sole reliance of Dunn and Gillam and their wives is the contention that the lease acquired va-

lidity when J. J. Eaves attached his signature to it as curator of the estate of Allie Daney. It is now conceded by all parties to the action that the lease was void up to January 26, 1914, when J. J. Eaves signed and acknowledged it. Dunn and Gillam and their wives set up this act as their *sole defense to the action*. If Eaves had not signed it, the plaintiff would have been entitled to a decree for the land. If his signature to the lease does not bind the estate they have no defense to the action.

We submit that under the rule in Oklahoma, as well as under the general rule, the estate of the minor was in no way bound by the act of J. J. Eaves in affixing his name as curator to the blank paper.

In the case of *Lowery v. Westheimer*, 160 Pac. 496, the correct rule on this subject is announced.

In that case the court construed a deed which contained the following granting clause:

“*Know all men by these presents: That I, Thomas M. Lowery, Jr., joined by my wife, Florence Lowery, of Hewitt, Carter County, Oklahoma, for and in consideration of the sum of forty-one hundred, sixteen and no/100 dollars (\$4,116.00), \$350.00 of which is cash in hand paid, the receipt of which is hereby acknowledged, and the assuming of two mortgages, one for the amount of \$2,700.00, one for the amount of \$1,066.00, on the land hereinafter described, and in favor of the Oklahoma Farm Mortgage Co., of Oklahoma City, Okla.*

“Do grant, bargain, sell and convey unto Max Westheimer and David Daube of Ardmore, Carter County, Oklahoma, the following described real property and premises situated in Carter County, Oklahoma, to-wit:” (then follows a description of 140 acres of the homestead allotment of Thomas M. Lowery, Jr., and 110 acres of her homestead allotment),

and held that the deed not only contains sufficient words to convey Florence Lowery's title to the land, but is in form sufficient to satisfy section 1143, Revised Laws of 1910, as indicating the consent of the husband to the sale of the land described in the deed, the same being a part of the homestead of the family.

It was contended that the deed did not contain operative words of grant so far as Florence Lowery was concerned, and that it did not convey a tract of land described in the deed which belonged to her and which constituted a part of the homestead of herself and family.

The court in that case said:

“There can be no doubt of the correctness of the rule laid down by Chief Justice TANEY, in *Agricultural Bank of Miss. v. Rice*, 4 How. 225, 11 L. ed 949, * * * in order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and merely signing and sealing and acknowledging an instrument, in which another person is grantor, is not sufficient, assuming that the 110 acres described in

the deed—the allotted homestead of Florence Lowery—was also the homestead of the family, the deed not only contains apt words of grant on her part sufficient to convey her title to the land, but is in form sufficient to satisfy the statute as indicating the consent of the husband to the sale thereof as a part of the homestead of the family.”

In *Agricultural Bank v. Rice, supra*, the Supreme Court construed a deed, the granting clause of which reads as follows:

“This indenture made the 14th day of September, in the year of our Lord one thousand eight hundred and thirty-five, between William M. Phipps in right of his wife Martha, William R. Haile in right of his wife Mary, and David H. Gibson in right of his wife Sarah, legal heirs and representatives of Adam Bower, deceased, of the County of Adams and State of Mississippi, of the one part, and Noah Barlow and Margaret, his wife, and Henry S. Holton and Theoda, his wife, of the same place, of the other part, *witnesseth*: That the said parties of the first part, for and in consideration of the sum of four thousand dollars, to them in hand paid by the said parties of the second part, at or before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, and the said parties of the second part, their heirs, executors and administrators, forever release therefrom, by these presents, have granted, bargained, sold, conveyed, and confirmed, and by these presents do grant, bargain, sell, convey and confirm unto the said parties of the second part, their heirs and assigns for-

ever, all that certain lot or parcel of ground situate in the City of Natchez."

The deed was signed as follows:

"In witness whereof, the said parties of the first part have hereunto set their hands and seals, this day and year above written.

Wm. M. Phipps,
Martha Phipps,
William R. Haile,
Mary Haile,
David H. Gibson,
Sarah Gibson;"

and acknowledged as follows:

"Personally appeared before the undersigned, justice of the peace for said county, William M. Phipps and Martha, his wife, and William R. Haile and Mary Haile, his wife, and David H. Gibson and Sarah Gibson, his wife, and acknowledged that they signed, sealed and delivered the within deed on the day and year and for the purposes therein contained. And Martha Phipps, Sarah Gibson and Mary Haile, wives of William M. Phipps, William R. Haile and David H. Gibson, having been examined separate and apart from their husbands, and acknowledged that they signed, sealed, and delivered the same as their act and deed, free of fears, threats, or compulsion of their said husbands."

In construing this deed, the Supreme Court, speaking through Chief Justice TANEY, said:

"This deed, also is inoperative as to their

title to the land. In the premises of this instrument, it is stated to be the indenture of their respective husbands in right of their wives, of the one part, and of the grantees, of the other part—the husbands and the grantees being specifically named; and the parties of the first part there grant and convey to the parties of the second part. The lessors of the plaintiff are not described as grantors; and they use no words to convey their interest. It is altogether the act of the husbands, and they alone convey. Now, in order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and merely signing and sealing and acknowledging an instrument, in which another person is grantor, is not sufficient. The deed in question conveyed the marital interest of the husbands in these lands, but nothing more.

“It is unnecessary to inquire whether the acknowledgment of the *femes covert* is or is not in conformity with the statute of Mississippi. For assuming it to be entirely regular, it would not give effect to the conveyance of their interests made by the husbands alone. And as to the receipt of the money mentioned in the testimony, after they became *sole*, it certainly could not operate as a legal conveyance, passing the estate to the grantee, nor give effect to a deed which as to them was utterly void.”

This decision of the Supreme Court of the United States has been cited with approval throughout the United States, and with practical unanimity, the rule announced therein has been approved in the decisions of the various states.

In Ruling Case Law, under head of "Deeds," section 29 reads as follows:

"On the question as to whether one who signs a conveyance is bound by it, although he does not appear in the body thereof to be a party to the instrument, there is some conflict of opinion; but the great weight of authority is in favor of the proposition that as to such person the deed is wholly inoperative. The theory of these cases is that apt words of conveyance must be shown in connection with the grantor's name in order to show an intent to convey, as distinguished from a mere assent to the act of some other grantor named; while the cases to the contrary are based on the theory that the whole instrument should be looked to and the evident intention carried out, without respect to the strict common law rules requiring the use of apt words in connection with the grantor's name."

In the footnote, under this section, many authorities are cited.

—*Stone v. Sledge*, 87 Tex. 49, 26 S. W. 1068;
Thompson v. Johnson, 58 S. W. 130.

In *LeBlanc v. Jackson*, 161 S. W. 60, it appears that a deed was drawn up naming a number of grantors, among them being Emerante Brouard. She died without signing the deed. It was subsequently signed and acknowledged by certain of her heirs who are not named in the body of the deed as grantors. The court held that the deed was not binding on the heirs, stating that:

“The fact that Emerante Broussard is named as one of the grantors in the body of the deed, and that her interest is to be conveyed, she being dead, would not distinguish this case from the general doctrine, which is well settled in this state, that a deed is not binding on one who signs it but who is not named in the body of the deed as one of the grantors. *Stone v. Sledge*, 87 Texas 49, S. W. 1087, 49 Am. St. Rep. 65; *Thompson v. Johnson*, 24 Texas Civ. App. 250, 58 S. W. 1030. The rule is different in some of the states. *Sterling v. Park*, 58 S. E. 828, reported also in 13 L. R. A. (N. S.) 298, 121 Am. St. Rep. 224, 12 Ann. Cas. 201. An extensive note to this report collates the authority showing that the weight of the authority is in favor of the rule stated in the Texas cases cited.”

See, also, *Jackson v. Craigen*, 167 S. W. 1101.

In *Lowery v. Westheimer*, *supra*, the Supreme Court reiterated the rule that in deeds, the words, terms and provisions of deeds are construed more strongly against the grantors. The contrary rule applies in the construction of oil and gas leases.

In late edition of Thornton’s work on The Law Relating to Oil and Gas, in section 219, it is said:

“In discussing the right of a lessor to rent or royalties, it must be borne in mind that oil and gas leases are usually construed favorably, in this respect, to the lessor, if there be a doubt concerning the right to rent or royalty, and its amount. The general rule is undoubtedly that a deed is construed most strongly against the grantor and in favor of the grantee. But such

is not the case in an instance of an oil or gas lease; and the reason for this arises out of the well known transactions of oil and gas operators."

See, also:

Frank Oil Company v. Belleview Gas Co.,
119 Pac. 260;

Barnsdall Oil Company v. Leahy, 195 Fed.
731, and

Betman v. Harness, 42 W. Va. 433, 21 S. E.
271, 36 L. R. A. 566.

An oil and gas lease conveys such an interest in land, that it must be in writing in order to comply with the statute of fraud. A lessor must use some words expressing the intention to create a leasehold estate.

—Thornton on Oil and Gas, section 291;
Woodruff v. Franklin, 204 Pac. 452.

We submit therefore that the signature of J. J. Eaves, curator, to the Thomas lease in no way bound the estate of the minor, that it was a nullity, and that no rights can be predicated thereon in this case. Neither can the fact that Eaves attached his signature to the Thomas lease be used by defendants, Dunn and Gillam, as a means of extracting the fraud out of the lease.

This is one of the distinct grounds on which the lease is attacked after it was "joined in" by Eaves as curator. It is alleged that the attaching of his

signature to the lease executed by Thomas "was wholly without effect, illegal and void" (Tr. 10).

The Circuit Court of Appeals however without conceding that the failure of Eaves to join in the body of the lease and connect himself with operative words of grant, rendered the lease void, satisfied itself by the statement that the compromise settlement made by plaintiff through which it received \$45,000.00 for the minor, had the effect of confirming the lease, and that if the plaintiff now has a right to continue the litigation against Dunn and Gillam that right is based upon their alleged fraudulent conduct and a claim for damages on account of fraud. Clearly the compromise with the defendants other than Dunn and Gillam did not have the effect of confirming the lease so far as Dunn and Gillam are concerned. We discuss the question as to whether the fraud was sufficient to justify action against Dunn and Gillam under another head. But we most emphatically insist that the compromise which was made cannot in any way inure to the benefit of Dunn and Gillam and relieve them of the consequences of their fraudulent conduct.

If the lease was not executed by Eaves so as to be binding as a curator's lease Dunn and Gillam have nothing to stand on in this case.

FOURTH PROPOSITION.

The fraud which entered into the execution and procurement of the oil and gas lease was never in any way condoned or taken out of the transaction. Dunn and Gillam, the lessees, and A. N. Thomas, the guardian of the minor, at all times carried in their minds the intention to commit the fraud, and as set forth in the fourth assignment of error, the fraudulent agreement was consummated in the months of August and September, 1915, when the lessees paid the guardian, for his personal and private use, \$3,500.00 in money, and delivered to him a Saxon automobile.

It will be noted on page 65 of transcript, in his original findings of fact, the trial court concluded that when J. J. Eaves attached his signature to the void lease "this had the effect of putting the oil and gas legal title in the Bull Head Oil Company *free from the legal effect of fraud in the execution of the lease by A. N. Thomas, as guardian.*" He also held that although from a fair preponderance of the evidence, there was legal fraud in the execution of the original lease by A. N. Thomas as guardian to Dunn and Gillam, yet that since J. J. Eaves was the legal guardian of the estate of the minor and he joined in the Thomas lease that carried the oil and gas title, when it was authorized by the County Court of Love County and "*afterwards approved by that court, and then afterwards approved by the Secre-*

*tary of Interior * * * that that had the effect of placing the oil and gas title in the Bull Head Oil Company free from fraud."*

Then again, as a part of the decree the trial court found, as appears on page 77 of the transcript, that when J. J. Eaves, curator of the estate of Allie Daney, subscribed his name to the lease previously executed by A. N. Thomas to Dunn and Gillam, it being the intention that Eaves should so execute the lease as to make it a valid oil and gas lease when approved by the county judge of Love County and by the Secretary of the Interior, that it was to be rendered "free from fraud." Certainly no intention to "free the transaction from fraud" can be attributed to Dunn and Gillam. Nor, can it be said that A. N. Thomas ever intended that the transaction should be an honest one. So far as Eaves personally was concerned he might have intended to execute a valid lease. He knew nothing about the fraudulent arrangement being carried on by Dunn and Gillam and A. N. Thomas. They concealed the fraud in the transaction from Eaves just as they concealed it from the County Court and county judge of LeFlore County, the County Court and county judge of Love County, the Indian Superintendent Kelsey and the Secretary of the Interior. At the time Eaves attached his signature to the Thomas lease it was the understanding that the lease which Eaves had executed in favor of Mullen should be abandoned by Mullen

and disapproved and rejected by the Secretary of the Interior (Tr. 105-106). Eaves was to resign as curator of the estate. On the 12th day of September, 1914, Eaves was discharged as curator (Tr. 239). It was then the understanding that Thomas was to be reappointed guardian of Allie Daney, and pursuant to this understanding he was reappointed by the County Court of LeFlore County September 30, 1914 (Tr. 226-227). While these events were taking place, Dunn still held in his name, for the use and benefit of A. N. Thomas 2000 shares of the capital stock of the Bull Head Oil Company of the value of \$2000.00.

On October 23, 1914, just after Eaves had resigned as curator of the estate, and A. N. Thomas had been reappointed, he wrote T. H. Dunn, among other things, as follows:

“Dear Friend:

I have been thinking for some time of writing you regarding our matter, and have come to the conclusion that it is time that our matter was fully settled. I know that you and Mr. Gil-lam are wanting to hold the matter, so I want you to either purchase or sell same for me. * * * I do not want same disposed of until I get the price that same is worth. So please make arrangements for me and write me when you are ready, and I will come over and bring the matter with me” (Tr. 83).

T. H. Dunn replied to this letter on the 3rd of November, 1914, in which, among other things, Dunn said:

"Atha, you ought to realize that the matter you referred to is one that requires a personal interview, and I will make an effort to visit you before the first of the year" (Tr. 84).

This correspondence certainly does not evidence an abandonment of the fraud in the procurement and execution of the lease. The lessor was demanding a settlement. He was trying to collect the bribe money. The lessee T. H. Dunn explained "that the matter you refer to is one that requires a personal interview."

On March 21, 1915, while Dunn still had 2000 shares of the Bull Head Oil Company's stock in his name as trustee, which he was holding for A. N. Thomas, he wrote Thomas the following characteristic letter, beating down the price of the stock:

"There is not a thing of interest that I can write you, I only wish I could and that is why I have had nothing to say. The oil field is dead as a door nail, we have only run one tank of oil this year so far and if I could see one bright spot ahead I would say so. Most of the companies are having to make assessments to meet their obligations and expenses. I have been terribly embarrassed owing to the position I have held with the different companies that I am interested, none of whom have money to pay expenses with and so long as they can make no sales it cannot improve."

In the early summer of 1915 negotiations for the sale by A. N. Thomas to Dunn and Gillam of his in-

terest in the stock of the Bull Head Oil Company were begun, and resulted in an agreement to sell the 2000 shares of the stock in the company then held in Dunn's name as trustee for \$1500.00 cash and for a farm. A sham escrow agreement was entered into in the name of J. J. Thomas, father of A. N. Thomas, with P. C. Dings, the effect of which was to provide that J. J. Thomas was to surrender the 2000 shares of stock to Dunn and Gillam in consideration of Dings' agreement to convey to J. J. Thomas a 200 acre tract of land near Ardmore, Oklahoma. Dunn and Gillam deeded the land to Dings and then Dings deeded it to J. J. Thomas with the understanding that a loan was to be procured on the land, and the proceeds of the loan paid to A. N. Thomas (Tr. 84-86). This arrangement was carried out, but it was the plainest kind of sham and subterfuge to keep A. N. Thomas' name from appearing on the surface. Judge WILLIAMS held in substance that this transaction was a sham and a fraud, and on page 68 of transcript he finds that T. H. Dunn and J. Robert Gillam acquired the interest held in the name of J. J. Thomas, the transaction being negotiated and concluded with A. N. Thomas. When this transaction occurred on July 20, 1915, Dunn and Gillam and A. N. Thomas were still carrying out the fraudulent agreement. They continued to commit the fraud until the following August and September, when the loan was completed and A. N. Thomas was paid the \$3500.00 and given a Saxon automobile. With re-

spect to this transaction, the trial court expressly finds:

“That T. H. Dunn held in his name as trustee shares of stock in the Bull Head Oil Company of the par value of two thousand (\$2,000.00) dollars, for the personal and private benefit of A. N. Thomas from the time the original stock of said company was issued until sometime in the year 1915, at which time he and J. Robert Gillam purchased the same from A. N. Thomas and paid him therefor the sum of three thousand five hundred (\$3500.00) dollars in money and a Saxon automobile.” (Tr. 76.)

This was done pursuant to the corrupt agreement which had been in the minds of A. N. Thomas, the guardian, and T. H. Dunn and J. Robert Gillam, the lessees, from the inception of the transaction. That agreement was never out of their minds.

The evidence overwhelmingly shows that they were committing a fraud upon the estate of the minor at every step they took from August 19, 1913, to September, 1915, when the money was paid and the automobile delivered.

The legal conclusion of the trial judge that the signing of the Thomas lease by J. J. Eaves as curator on January 26, 1914, rendered the lease *free from fraud*, is in irreconcilable conflict with the facts. The fraud in this case is essentially one of fact, overwhelmingly proved on the trial, found to exist by the trial court and by the Circuit Court of Appeals. It is immaterial so far as the question of fraud was

concerned, whether A. N. Thomas was the rightful guardian of the minor's estate or not. In every way possible Dunn and Gillam recognized him as the guardian of the estate. They accepted the lease from him as guardian, agreed to pay royalty to him as guardian, transferred the lease to the Bull Head Oil Company, and accepted the benefits from the lease to the extent of thousands of dollars. Under every principle of law and equity they are estopped from denying the validity of the lease executed by A. N. Thomas, as guardian of the Allie Daney estate.

Section 5247, Compiled Statutes Oklahoma, 1921, has been in force ever since statehood. That section reads as follows:

“Any person or corporation having knowingly received and accepted the benefits or any part thereof of any conveyance, mortgage or contract relating to real estate, shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud; but this section shall not apply to minors or persons of unsound mind who pay or tender back the amount of such benefit received by themselves.”

That section was construed by the Oklahoma Supreme Court in *Avey v. Van Voorhis*, 140 Pac. 615, where it was held according to the second section of the syllabus:

“The son who, with full knowledge of all

the facts, accepts his part of the proceeds of the sale of his father's real estate, sold and conveyed by an attorney in fact after the death of his father, and who retains the proceeds 11 years before commencing action to establish his claim to the property as an heir of his father, is, under section 1150, Rev. Laws, 1910 (which is the same as section 5247, Compiled Statutes, 1921), estopped from asserting such claim, and from declaring the invalidity of the deed executed by the attorney in fact."

See *Anchor Steam Bottling Works v. Baumle*, 155 Pac. 518.

From August, 1913, to January, 1914, Dunn and Gillam contended before the Indian Superintendent that Thomas was the rightful guardian of Allie Daney, that the lease executed by him was in all respects legal and ought to be approved. They employed counsel who filed before the Indian Superintendent an elaborate brief in support of the legality of the appointment of Thomas as guardian and urged the approval of the lease executed by him. They charged that Eaves was not the legal guardian of the estate of Allie Daney and that he was a professional curator for Mullen, appointed at the instance of Mullen in order that Mullen may exploit the lands of Allie Daney to her detriment, and that the pretended authority of Eaves as curator of Allie Daney was in fraud of her rights and in defiance of the laws controlling guardians and their wards in Oklahoma (Tr. 199-205).

Under the statutory rule in Oklahoma, Dunn and Gillam were irrevocably bound up with the A. N. Thomas lease, and clearly estopped from denying the authority by which he executed it, or from avoiding any of the consequences of this fraudulent conduct in the procurement of the lease. We submit therefore that the trial court erred in his legal conclusion that J. J. Eaves by attaching his name to the Thomas lease and joining therein, rendered it free from fraud.

The Thomas lease, joined in by Eaves, was offered in evidence by the defendants as a muniment of their title. If it is subject to the criticisms here offered, it failed to show they had any interest in the leased premises. Hence it was not necessary for the plaintiff to anticipate its introduction. It was offered by the defendants in defense of the plaintiff's cause of action. It stands in the record for what it is worth. If it shows title to the oil and gas lease in defendants it should have been admitted and given that effect. If it is void for the reasons here pointed out, then it is no defense to the plaintiff's cause of action.

FIFTH PROPOSITION.

The United States Circuit Court of Appeals erred in holding that the lease in controversy was executed for a full and adequate consideration, and in holding that the estate of Allie Daney, the ward of the Gov-

ernment for whom this suit is being prosecuted, was not damaged or injured by reason of the fraud perpetrated by Dunn and Gillam in procuring the lease, and in not holding that the lease at the time it was joined in by J. J. Eaves on the 26th day of January, 1914, had a rental value of from four to six hundred dollars an acre, and an aggregate lease value of from sixteen to twenty-four thousand dollars, as set forth in the thirteenth and sixteenth assignments of error, to which reference is hereby made; and the court erred in holding that the fraud committed in procuring the lease is not actionable.

The Circuit Court of Appeals at page 263 of transcript says there is no testimony in the record which supports a conclusion that the Thomas lease was made for an inadequate consideration and that it did not provide a fair and reasonable return to the ward. The court then states that it is an established principle that fraud without damage is not actionable, either at law or in equity, and "that the facts in this case do not show that the minor sustained any damage on account of the fraudulent conduct charged against Dunn and Gillam."

If, as held by the trial court, the Thomas lease was void until joined in by Eaves the curator, then this transaction, so far as the making of the lease is concerned, must be treated as having begun on the 26th day of January, 1914, when Eaves joined in the lease. At that time the uncontradicted evidence

shows that the lease had rental value of four to six hundred dollars per acre, or of the aggregate rental value of from sixteen to twenty-four thousand dollars.

At page 160 of transcript Frank Adams testified as follows:

“I was familiar with the value of the oil and gas leases in the vicinity of this land on January 9, 1914; this lease had a market value of from four to five hundred dollars per acre.”

On pages 161 and 162 of transcript it appears that J. S. Mullen testified as follows:

“I know what the departmental lease on the Allie Daney land was worth the latter part of January, 1914; it was worth about the capital stock of the company, that is, about eighteen thousand dollars.”

On page 164 of transcript it appears that Erret Dunlap testified as follows:

“I think I know what the market value of the Allie Daney lease was on January 28, 1914, and I would say five hundred dollars an acre would be a fair market value for it at that time.”

On page 158 of transcript it appears that P. C. Dings testified as follows:

“I have been engaged in the oil business in the Healdton field and am familiar with the value of leases in that field; I am familiar with its value in January, 1914, and would say that it

was worth four or five hundred dollars an acre at that time."

Evidently the Circuit Court of Appeals did not read the testimony of these witnesses. There is absolutely nothing in the record to contradict their testimony. That court therefore was in error in the statement that the \$2000.00 bonus exacted by the Indian Superintendent was an adequate consideration for the lease. The Indian Superintendent could have obtained a much larger bonus if he had not been so insistent upon having the compromise which he had proposed carried into effect. If he had recommended the rejection of both leases and required the guardian or the curator to offer a lease on the local market at Ardmore on January 26, 1914, he could have obtained a bonus from sixteen thousand to twenty-four thousand dollars. It is undisputed that the lease value of the land for oil and gas purposes was rapidly increasing along about that time. We invite special attention to the report of O. U. Bradley, United States Oil Inspector, made to Kelsey, Indian Superintendent, as of date December 22, 1913. After reciting in detail the conditions prevailing on August 19, 1913, the date of the lease, he states:

“The discovery well made several flows and all indications at that time were such as to lead one to conclude that at a very conservative estimate it had a capacity of 100 barrels daily, and although at the time this lease was executed the

real capacity of the well was not ascertainable, the conditions surrounding this discovery and subsequent work thereon were extremely promising for a splendid producer, so that the lease executed upon the date mentioned above would undoubtedly command a substantial sum as a bonus consideration. In view of these facts, I am of the opinion the lease was worth \$100.00 per acre, or \$4000.00 upon the date of its execution and I so recommend" (Tr. 206-7).

This report is an official document and ought to have great weight in determining the lease value of the land on the 19th day of August, 1913, when the original lease was executed. The bonus then agreed upon was \$70.00 (Tr. 131). It is also probable that the Circuit Court of Appeals overlooked the fact that this report of the United States oil inspector was approved by the Indian Superintendent in a letter dated January 9, 1914, and addressed to Dunn and Gillam at Ardmore, Oklahoma, in which he says:

“Referring to oil and gas lease on 40 acres of the Allie Daney land heretofore in controversy between yourselves and Mullen, I respectfully beg to enclose herewith copy of report of United States oil inspector wherein he fixes the bonus value of the land at the time your lease was taken (August 19, 1913), at \$100.00 an acre or \$4000.00 for the lease. Please forward draft to cover same when the papers in connection with the lease are submitted” (Tr. 192).

Clearly if the Circuit Court of Appeals had considered the official action of the United States oil

inspector in appraising the lease value of the land in August, 1913, at \$4000.00 and the approval of that appraisement by Kelsey the Indian Superintendent, it would not have held that a bonus of \$2000.00 was an adequate bonus on January 26, 1914, after the lease value had rapidly increased until, according to the uncontradicted testimony of the witnesses Dings, Dunlap, Adams and Mullen above quoted, it had a lease value at that time of from sixteen to twenty-four thousand dollars.

During the scramble over the lease and the negotiations which resulted in a compromise between the Dunn and Gillam and the Mullen factions, nobody seemed to be very much interested in the minor. The Indian Superintendent recommended the approval of the lease with a bonus of \$2000.00, the value of the bonus being fixed as of August, 1913. He had before him the official appraisement of the bonus value of the lease as of that date at \$4000.00. He approved that appraisement and demanded the payment thereof by Dunn and Gillam. He waived the payment of the \$4000.00 and substituted for it a bonus of \$2000.00. The guardian, Thomas, was not looking after the interest of the minor while these events were occurring, because Dunn and Gillam had bribed him to give them the lease on payment of a bonus of \$70.00 and he was actively engaged in earning the bribe money, which was subsequently paid him. Of course Dunn and Gillam were not look-

ing out after the interest of the minor. These circumstances evidently escaped the attention of the court, and we feel sure that the testimony of the other witnesses above mentioned showing that the property had a lease value of from sixteen to twenty-four thousand dollars on January 26, 1914, also escaped the attention of that court. It is impossible to reconcile any consideration of this evidence and these circumstances with the statement in the opinion of the Circuit Court of Appeals that there is no testimony in the record which supports a conclusion that the Thomas lease was made for an inadequate consideration, and, for that reason, the fraud perpetrated by Dunn and Gillam was not actionable.

No doubt that in the course of time the minor's land would have been subject to some drainage, but that is a matter of speculation. Oil wells have been in operation on this tract of land for nearly eleven years, and they are still producing oil. There is no evidence in the record that drainage would have started on this land before a new lease could have been executed and operations begun under it. The Circuit Court of Appeals refers to the fact that in the settlement with the defendants other than Dunn and Gillam and their wives, \$45,000.00 was acquired for the benefit of the minor, as a circumstance to show that she has done reasonably well with this lease. Reference is also made to the fact that at the time of the trial of the case in April, 1920, the mi-

nor had received \$72,515.00 in royalties. We submit that these matters should not be considered in determining whether an adequate bonus was procured for the lease in January, 1914. While the minor was getting the \$72,515.00 royalty, the lessees were getting more than a half million dollars in money and by this time they have probably made more than a million out of the oil and gas produced from this lease. The court must look to the conditions prevailing at the time the lease was executed. From the uncontradicted testimony it appears that the lease had a bonus value of from sixteen to twenty-four thousand dollars on the 26th day of January, 1914, when, according to the contentions of both plaintiff and defendant, the lease in controversy first acquired its validity, if it ever was valid.

We submit therefore that the fraud which entered into the procurement and execution of the lease and remained therein from its inception until August and September, 1915, controlling the conduct of the guardian lessor and the lessees, Dunn and Gillam, during all that time is actionable, and that the authorities cited by the Circuit Court of Appeals to support its conclusion that the fraud committed by Dunn and Gillam is not actionable, are wholly inapplicable to the facts in this case.

To sustain the position that the fraud which entered into the procurement and execution of the lease in controversy is not actionable, the Circuit

Court of Appeals cited the case of *Ming v. Woolfolk*, 116 U. S. 599, 29 L. ed. 740, which was an action to recover damages for deceit and it was held that the plaintiff could not recover damages in such an action where it appears that the defendant by false representations induced the plaintiff to do something which he would have done anyhow and by which he sustained no loss. That case certainly is not applicable here.

The Circuit Court of Appeals also cites the case of *Marshall v. Hubbard*, 117 U. S. 415, 29 L. ed. 999, where it was held that, giving the defendant the benefit of every inference that could have fairly been drawn from the evidence, it was insufficient to authorize a verdict in his favor, a peremptory instruction for the plaintiff was proper. There is not a syllable in that case relating to sufficiency of fraud to sustain a cause of action. It is an ordinary action based on fraudulent representations where the testimony was so overwhelming against the defendant that the court held an instruction in favor of the plaintiff was justified. The case does not in any particular support the position to which it is cited by the Circuit Court of Appeals.

The case of *Smith v. Bowles*, 132 U. S. 125, 33 L. ed. 279, is also cited by the Circuit Court of Appeals to support the position that the fraud committed by Dunn and Gillam is not actionable. Unfortunately this case also contains nothing on the

subject of the sufficiency of fraud to sustain a cause of action. The case was reversed, not because the fraud proven caused no detriment and therefore was not actionable, but solely because the trial court in its charge to the jury adopted the wrong measure of damage.

The case of *Sigafus v. Porter*, 170 U. S. 116, 45 Law. edition 113, did not turn on the question as to whether or not the fraud alleged and proved had caused no damage and was therefore not actionable; but the decision related entirely to an erroneous instruction on the measure of damages, and was reversed because an erroneous rule on that subject had been given by the trial court in its instructions to the jury.

The court also cites the case of *Clark v. White*, 12 Peters 178, and quotes a paragraph from the syllabus to the effect that in equity as in law the injury and fraud must concur to furnish ground for judicial action. A mere fraudulent intent unaccompanied by any injurious act is not subject to judicial cognizance. The facts of that case bear no resemblance whatever to the facts in the instant case, and the mere quotation in the opinion of that principle is not enlightening. The court might have improved the quotation if it had quoted the entire paragraph. The fraud in the case at bar is not in any sense abstract—it is direct and positive—corrupt if you please, and falls clearly within the principle an-

nounced in the part of the paragraph quoted from which was omitted by the Circuit Court of Appeals, and is as follows:

“Fraud ought not to be conceived; it must be proved and expressly found.”

Both of these requirements have been met in the case at bar. The fraud has been proved and the trial court has found it to exist.

The Circuit Court of Appeals also quotes an abstract principle from the case of *Garrow v. Davis*, 15 How. 273, 14 L. ed. 692, but that case went off because the charges of fraud in the bill were denied in the answers and the evidence was insufficient to sustain the allegations.

The Circuit Court of Appeals also cites a number of cases in the Federal Reporter, and a number sections from Story's *Equity Jurisprudence*, Pomroy's *Equity Jurisprudence* and Bispham's *Rules of Equity*. But they merely sustain the abstract principle that to be actionable, fraud must be proven and shown to have caused injury.

In this case the plaintiff did both. It established allegations of fraud by overwhelming proof, and showed that the fraudulent conduct of the defendants Dunn and Gillam was the cause of the execution of an oil and gas lease on the estate of the minor, Allie Daney, upon a wholly inadequate bonus consideration.

Another case cited by the Circuit Court of Appeals is *Angle v. Railway Company*, 151 U. S. 1, 38 L. ed. 1, but we most respectfully state that it contains no relief whatever for the defendants in this case, and no support for the decision of the Circuit Court of Appeals. That opinion is one of the great landmarks of American jurisprudence and illustrates the adequacy of the powers of the courts to discover fraud and punish the violation of rights. We cite that case on another proposition in this brief and rely upon it with great confidence.

In order for fraud to be actionable it is not necessary that any particular amount of pecuniary loss be sustained. It is sufficient if fraud actually exists, and any amount of financial injury results therefrom. The rule on this subject is correctly stated in Sec. 898, Vol. 2, 14th Edition of Pomeroy's *Equity Jurisprudence*, as follows:

“Fraud without resulting pecuniary damage is not a ground for the exercise of remedial jurisdiction, equitable or legal; courts of justice do not act as mere tribunals of conscience to enforce duties which are purely moral. *If any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury; it is sufficient if the party mislead has been very slightly prejudiced, if the amount is at all appreciable.*”

See, also:

Spreckles v. Gorrell, 92 Pae. 1011;

Wainscott v. Occidental Association, 98 Cal. 257, 33 Pac. 88.

See, also, 26 Corpus Juris, page 1171, where the rule is stated as follows:

“While the general rule may be otherwise with respect to actions for rescission, where the action is one for deceit the damage or injury necessary to make out a cause of action in favor of plaintiff must to some extent, at least, be pecuniary or substantial, as distinguished from mere injury to feelings, in order to warrant a recovery. A right of action accrues, for example, where a person has been induced to enter into a contract by means of fraudulent representations, as for the purchase or sale of real or personal property or for the exchange of property; and recovery in deceit has been allowed for fraud causing the loss of an inchoate right of dower. In any event the damage, it has been held, need not be accurately measurable in money, it being sufficient if there is an injury to some property right, as distinguished from mere injury to feelings.”

In Oklahoma the statute prohibits a guardian from acquiring an interest in his ward's property when sold by him, regardless of the absence of fraud or the adequacy of the price paid.

—*Burton v. Compton*, 150 Pac. 1080;

Winsted v. Shank, 173 Pac. 104;

Allison v. Crummy, 166 Pac. 691.

Section 1305 of Compiled Statutes Oklahoma, 1921, prohibits an executor or administrator from

directly or indirectly purchasing any of the property of the estate he represents, and prohibits him from being interested in any sale thereof.

Section 1478 of Compiled Statutes 1921, makes section 1305 applicable to sales by guardians of the property of their wards and prohibits them from being interested in any sale of the same.

The case of *Chastain v. Pender*, 152 Pac. 833, involved the purchase of real estate by the wife of the administrator at the administrator's sale. After the sale was approved by the County Court having probate jurisdiction, the wife, who was one of the heirs to the estate, brought suit against the other heirs to recover the title to the property. The heirs defended upon the ground that the statute prohibited the wife from purchasing at the administrator's sale, because her purchase inured indirectly to the benefit of the husband who was administrator of the estate. The court held that the sale was void even in the absence of actual fraud, and notwithstanding the fact that an adequate price was paid. Speaking on this point, the court said:

“As to the first proposition presented, whether the husband administrator can sell the estate of his wife, we need look no further than the well considered opinion of *Burton v. Compton*, 150 Pac. 1080, where we find this question answered in the negative. We quote therefrom: ‘The first proposition is before this court for the first time. Yet it is an old question, and has been passed upon repeatedly. And as far

as we know, Indiana stands alone in upholding such deeds. In 1781, long before there was any statute upon the subject, Lord Chancellor Thurlow of England, in *Fox v. Mackreth*, 2 Leading Cases in Equity (White and Tudor) 722, held: "That trustees expose themselves to great peril in allowing their own relatives to intervene in any matter connected with the execution of the trust; for the suspicion which that circumstance is calculated to excite, where there is any other fact to confirm it, is one which it would require a very strong case to remove." And he says, in substance, that the rule rests upon public policy, and such a purchase will not be permitted in any case, however honest the circumstances, for the general interest of public justice requires it to be destroyed in every instance, and that: "From general policy and not from any peculiar imputation of fraud, a trustee shall remain a trustee to all intents and purposes". And our statute (section 6409, Revised Laws 1910) says: "No executor or administrator must directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale". But the defendant (plaintiff in error) insists that this transaction was free from fraud, and that the price paid was adequate. That might all be true in this particular case, but the law looks beyond the circumstances of any individual case; for, as said in *Frazier v. Jeakins*, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575: "The opportunities which are open to an unfaithful trustee to advantage himself out of the trust estate are so many and so tempting, and the condition of the beneficiary in the trust ordinarily so helpless and confiding, that the law gives warning in advance against all transactions out

of which it is possible for the former to make gain at the expense of the latter". And for this reason the Legislature has fixed this statutory rule which removes both the temptation and opportunity to do wrong. And the courts can make no distinction in the application of the rule between the honest and the dishonest. And whether the transaction be free from fraud or not is immaterial to the issue in the case. It is a transaction prohibited by the statute and condemned by public policy. * * * Besides, as well said in *Tyler v. Sanborn*, 128 Ill. 136, 21 N. E. 193, 4 L. R. A. 218, 15 Am. St. Rep. 97: "There is, moreover, apart from this pecuniary interest, an intimacy of relation and affection between husband and wife and of mutual influence of the one upon the other for their common welfare and happiness, that is absolutely inconsistent with the idea that the husband can occupy a disinterested position as between his wife and a stranger in a business transaction. He may, by reason of his great integrity, be just in such a transaction, but, unless his marital relations be perverted, he cannot feel disinterested; and it is precisely because of this feeling of interest that the law forbids that he shall act for himself in a transaction with his principal. It is believed to be within general observation and experience that he who will violate a trust for his own pecuniary profit will not hesitate to do it, under like circumstances, for the pecuniary profit of his wife". And for that reason the law forbids a trustee to put himself in a position where either his integrity may be questioned or his inclination to dishonesty may be indulged".

In the case of *Vaughan v. Vaughan*, 162 Pac. 1131, it appears that there was an agreement among certain creditors of an estate in process of administration by which an administrator purchased all the property of the estate represented by him, and instead of satisfying an outstanding mortgage on the property, permitted the mortgage to be foreclosed and from the money derived from the estate purchased it at foreclosure sale. In a suit by the heirs against the administrator, it was held that the District Courts of Oklahoma had jurisdiction to declare a trust in the property purchased and held in the name of the administrator in favor of the heirs. After quoting the statute above referred to prohibiting an administrator from directly or indirectly purchasing the property of the estate he represents, or from being interested in the sale thereof, the court approved the rule laid down in *Allison v. Crummey, supra*, and *Chastain v. Pender, supra*, and also quoted from the case of *Imboden v. Hunter*, 23 Ark. 622, 79 Am. Dec. 116, as follows:

“It is a stern rule of equity that a trustee to sell for others is not allowed to purchase, either directly or indirectly, for his own benefit, at the sale. He cannot be both vendor and purchaser. As vendor, it is his duty to sell the property for the highest price, and as purchaser it is his interest to get it for the lowest, and these relations are so essentially repugnant, so liable to excite a conflict between self-interest and integrity, that the law positively forbids

that they shall be united in the same person. And it matters not, in the application of the rule that the sale was bona fide, and for a fair price. The inquiry is not whether there was fraud in fact. In such a case, the danger of yielding to the temptation is so imminent, and the security against discovery so great, that a court of equity, at the instance of the *cestui que* trust, if he applies in a reasonable time, will set aside the sale, as of course. The rule is not intended to remedy actual wrong, but is intended to prevent the possibility of it. The situation of the party, itself, works his disability to purchase. * * * The rule is not confined to persons who are trustees within the more limited and technical signification of the term, or to any particular class of fiduciaries, but applies to all persons placed in a situation of trust or confidence with reference to the subject of the purchase. It embraces all that come within its principle, permitting no one to purchase property and hold it for his own benefit, where he has a duty to perform, in relation to such property, which is inconsistent with the character of a purchaser on his own account, and for his individual use."

These authorities do nothing more however than reiterate the general rule on the subject. In the case at bar the faithless guardian and his lessees Dunn and Gillam, in violation of the express provisions of the statute, entered into a fraudulent oil and gas lease by which they agreed that the guardian should have for his personal and private use an undivided one-fourth interest in the lease. That interest was later reduced to a one-eighth interest in the lease

and finally, in pursuance to the original fraudulent agreement, the interest of the guardian took the form of stock in the oil company and was afterwards purchased from the guardian by the lessees for \$3,500.00 and a Saxon automobile. The transaction was prohibited by statute. Clearly the United States, by virtue of its duty as *in loco parentis* of the minor, could maintain an action to set the lease aside. Dunn and Gillam having assigned the lease to an innocent purchaser for value, clearly are liable in this action brought by the United States for all the profits which they made out of the transaction. Gillam sold his stock in the oil company to Jake Hamon for \$75,000.00 (Tr. 168). He had previously collected, after having refunded to him all advancements made to the company, a dividend of five hundred per cent on the stock he owned in the company. Dunn and Gillam are joint *tort feasors*, and therefore both of them are liable for the profits made out of the transaction by either of them. Dunn had about the same amount of stock as Gillam and is directly liable in an accounting to about the same extent as is Gillam.

Under the decision of the United States District Court and the Circuit Court of Appeals, these two fraudulent lessees, joint *tort feasors* in the commission of the fraud, have been permitted to go unwhipped of justice and to carry off the profits made by them to the extent of more than two hundred thousand dollars.

We respectfully submit that the decision of each of the courts is wrong and that the case should be reversed, and Dunn and Gillam and their wives held to a full accounting.

SIXTH PROPOSITION.

The eleventh assignment of error is to the effect that the Circuit Court of Appeals erred in considering the recitals in the motion of T. H. Dunn and wife and J. Robert Gillam and wife to dismiss the appeal in determining the merits of the case, for the reason that the motion to dismiss the appeal constituted no part of the record proper on appeal.

Sometime after the case was filed in the Circuit Court of Appeals T. H. Dunn and wife and J. Robert Gillam and wife, filed a motion to dismiss the appeal (Tr. 253-258). The motion was overruled, but it contains certain recitals with reference to a compromise between the plaintiff and certain defendants. These recitals show that in consideration of an agreement not to seek a reversal of the case as against the Bull Head Oil Company and certain stockholders, that company agreed to pay the minor the proceeds of seven-sixteenths of the oil runs from the lease until the sum of \$45,000.00 was paid. This compromise was made in the months of August and September, 1921, after the trial of the case on the merits in the court below had been concluded on June 7, 1920. While it was entirely proper to con-

sider all the recitals of fact in the motion in determining whether the appeal should be dismissed, we submit that citation of authorities is unnecessary to show that the Circuit Court of Appeals should not have taken into consideration the recital of the payment of this \$45,000.00 in determining the merits of the case, and that the payment of this sum of money on a compromise long after the trial of the case had been concluded should not be urged as an argument to show that a sufficient bonus was obtained for the lease in 1914.

SEVENTH PROPOSITION.

The sixth, seventh, eighth, ninth and thirteenth assignments of error may be considered together, and they complain of the action of the trial court and the United States Circuit Court of Appeals in not rendering judgment against the defendants, T. H. Dunn and his wife and J. Robert Gillam and his wife, for all moneys received by each, or any of them, from the proceeds of the oil and gas derived from the premises covered by the oil and gas lease in controversy, or from the stock of the Bull Head Oil Company.

Dunn and Gillam, having procured from the guardian of Allie Daney the lease in controversy by fraud, they became trustees for her use and benefit, and a court of equity must treat her as at all times the beneficial owner of the oil and gas rights and

the proceeds of the oil and gas taken from the premises covered by the lease. The Bull Head Oil Company and the stockholders of that company having been shown to be bona fide purchasers for value of the lease conveying the oil and gas rights and of the stock in the Bull Head Oil Company, a court of equity in holding Dunn and Gillam to an accounting should render a decree for the value of the lease at the time of trial, including the proceeds of the oil and gas taken from the lease.

When a fraudulent sale of a ward's property is made by his guardian, courts of equity disregard the form of the transaction and treat the ward as being at all times the beneficial owner of the property.

In the course of a discussion of the equitable maxim that equity regards and treats that as done, which in good conscience ought to be done, at the end of section 369, volume 1 of Pomeroy's Equity Jurisprudence, it is said:

“Finally, in trusts arising by operation of law, implied, constructive, and resulting trusts, the equity subsisting between the *cestui que* trust and the holder of the legal title, and the obligation resting upon the latter, are treated as though worked out, by regarding the beneficiary as vested with an equitable but no less real ownership.”

Thus, in the consideration of this case, the court must treat as having been done by Dunn and Gillam that which in good conscience ought to have been

done. That is, that they ought to have immediately surrendered and released the oil and gas lease; and their failure to do so, will in a court of equity not deprive the ward or the plaintiff of the beneficial ownership of the lease, and the proceeds of the oil produced under the operation of the lease.

—*Heinrich v. Heinrich*, 84 Pac. 326.

This principle, that is, that the court must treat the lease and all the oil and proceeds of the oil arising therefrom, as at all times the property of the ward, is further illustrated and emphasized in section 1053, volume 3, Pomeroy's *Equity Jurisprudence*, under head of "*Trusts Ex Maleficio.*" where it is said:

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a

higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer. Where these instances are so many and various, there are certain special forms of frequent occurrence and great importance which require particular mention.”

This section of Pomeroy was quoted with approval by this court in the great case of *Angle v. Chicago, St. P. M. & O. R. Co.*, 151 U. S. 1, 38 L. ed. page 1.

The court also quotes Sec. 155 of Pomeroy's *Equity Jurisprudence* as follows:

“If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.”

With regard to the remedy of the *cestui que* trust against the wrongdoer, in section 1058, volume 3, Pomeroy's *Equity Jurisprudence*, it is said:

“The essential nature of constructive trusts has been explained in a former paragraph; Equity regards the *cestui que* trust, in all instances except that last mentioned in favor of creditors, although without any legal title, and perhaps without any written evidence of interest, as the real owner, and entitled to all the rights and consequences of such ownership. Numerous important questions concerning the conduct of trustees, their relations with the trust property and with the beneficiaries, which arise from express trusts, can have no existence in connection with constructive trusts. Every act of the trustee in holding, managing, investing or otherwise dealing with the trust property as though he could retain it, is itself a violation of his paramount obligation to the beneficiary. If the trustee refuses or delays to convey the property to its beneficial owner, and retains it, derives benefit from its use, and appropriates its rents, profits, and income he must account for all that he thus receives, and pay over the amount found to be due to the *cestui que* trust, as well as convey to him the *corpus* of the trust fund. The beneficiary, therefore, being the true owner, may always, by means of an equitable suit, compel the trustee to convey or assign the *corpus* of the trust property, and to account for and pay over the rents, profits, issues and income which he has actually received, or, in general, which he might with the exercise of reasonable care and diligence have received. In such a suit the plaintiff is also entitled to any additional or auxiliary remedy, such as injunction, cancellation, accounting, which may be necessary to render his final relief fully efficient. No change in the

form of the trust property, effected by the trustee, will impede the rights of the beneficial owner to reach it and to compel its transfer, provided it can be identified as a distinct fund, and is not so mingled up with other moneys or property that it can no longer be specifically separated. If the trust property has been transferred to a bona fide purchaser for value without notice, or has lost its identity, the beneficial owner must, and under other circumstances he may, resort to the personal liability of the wrongdoing trustee. The existence of a constructive trust, as of a resulting one, must be proved by clear, unequivocal evidence."

—*Arnold v. Smith*, 140 N. W. 749;

Johnson v. McKenna, 78 Atl. 19.

Speaking of the remedies of the *cestui que* trust against a trustee who has violated his trust, the Court of Civil Appeals of Texas, in the case of *Sullivan v. Ramsey*, 155 S. W. 580, speaking through Chief Justice FLY, said:

"It is a well settled rule of law that, where a trustee wrongfully converts trust property to his own use, the *cestui que* trust is entitled, in equity, to a personal decree for the value of the property so converted. *Boothe v. Fiest*, 80 Tex. 141, 15 S. W. 799; *Silliman v. Gano*, 90 Tex. 637 39 S. W. 559, 40 S. W. 391; *Loomis v. Satterthwaite*, 25 S. W. 68; *Home Inv. Co. v. Strange*, 152 S. W. 510. In addition to the claim of the beneficiary upon the trust estate, the trustee incurs a personal liability for a breach of trust by way of compensation or indemnification, which

the beneficiary may enforce at his election which becomes his only remedy when the trust property has been placed beyond his reach by the wrongful act of the trustee. Pom. Eq. Jur., Sec. 1080. Appellants had sold the property, not only to Gunter, but to other parties, and the land was involved in a perfect mesh of vexatious litigation, into which appellees could not be dragged by men to whom they had intrusted their property. Neither law nor equity would compel them to bring a suit for the property itself under such circumstances, even though they may have believed that the sales were simulated, and that the real title was still in the trustees. Before they could be compelled to look to the property itself, rather than to the trustees, for reimbursement, the property should be in as favorable a condition as it was when placed in the hands of the trustees. They could not be compelled to sue for property loaded down with litigation made possible by the trustees. As said by the Supreme Court in the cited case of *Silliman v. Gano*: 'But we are of the opinion that when the trustee has treated the property as his own, and has sold it and thereby passed the legal title, he is in no position to demand that his *cestui que* trust shall proceed against the purchasers; and that by the breach of trust he becomes, in any event, personally liable to make compensation to the beneficiary for his property. It is equitable that the *cestui que* trust should recover of a purchaser with notice, if he elects to do so; but it is inequitable, at least between the trustee and purchaser, that he should be required to proceed against the latter and let the former go free. * * * We are of opinion,

therefore, that when the trustee betrays his trust by a sale of the property the beneficiary can hold him responsible for its value, although he may, if he so elect, be enabled to proceed against the property sold.'

"Appellants seek to have the rule as to the measure of damages in ordinary cases of conversion applied to them; but, as said by the Court of Civil Appeals in the Third District in the case of *Mixon v. Miles*, 46 S. W. 105: 'The general rule concerning the liability of trespassers for the conversion of property does not apply in a case of this character, which is to the effect that the value of the property, with interest thereon, at the time of conversion, is ordinarily the measure of damages in such a case. A different principle, we think, obtains in a case like this, where the evidence shows a gross abuse of duty on the part of the trustee.' A writ of error was refused in that case, in a written opinion by the Supreme Court, and as to the measure of damages, citing the case of *Boothe v. Fiest*, 80 Tex. 141, 15 S. W. 799, the court said: 'It was held that the measure of damages was either the purchase money for which the land was sold and interest, or the value at the time of the trial, at the option of the plaintiffs less, of course, in either case, the amount of the mortgage debt.' *Mixon v. Miles*, 92 Tex. 318, 47 S. W. 966.

"In the cited case of *Boothe v. Fiest*, it was held, after quoting from Perry on Trusts (Section 844), 'This rule would indicate that, where the beneficiary sues for compensation, and not for the proceeds of the sale, with interest, the measure of his recovery would be the value of

the land at the time of the trial, and we think such the proper rule in this case'. That was said in a case of violated trust, and citing it and the *Mixon v. Miles* case the Supreme Court, in the case of *McCord v. Nabours*, 101 Tex. 494, 109 S. W. 913, 111 S. W. 144, held: 'It is objected to the instruction given in connection with the measure of damages that the court of Civil Appeals directs the trial court to assess the value of the land at the time of the trial and to give interest on the sum so assessed from the date when the property was misappropriated by McCord. If this were a proper construction of the opinion, we would hold it to be erroneous, but we are of opinion that the language of the court means nothing more than that when the judgment is entered for the value at the time of the trial that judgment shall bear interest, which would be just the effect the law would give it if the court had not mentioned the question of the interest'.

"Those decisions fixing the measure of damages in cases of broken faith and violated trust are based upon the principle that no man who has trampled upon the trust reposed in him by another, in regard to his property, shall be allowed to reap a benefit therefrom, but shall return to the beneficiary the enhanced value of the property, if such has occurred. It would be putting a premium upon disloyalty and bad faith if a trustee who has breached his trust and converted the property of the *cestui que* trust to his own use and benefit could answer for his breach of the trust by paying a lower value than that at time of trial."

If Dunn and Gillam still held the lease, the recovery against them would be complete, the decree would go for an accounting for all oil or gas and the proceeds thereof received by them from the premises, for the cancellation of the lease and restoration of the property in its improved condition to the ward; but having transferred the lease to the Bull Head Oil Company, an innocent purchaser for value, the lease itself cannot be set aside and the property restored to the ward. The recovery against Dunn and Gillam must therefore be in damages to include all moneys received by them or either of them and the value of the lease at the time of the trial.

Dunn and Gillam having entered into the fraudulent arrangement, and under the rules of equity being treated as trustees *ex maleficio* of the title to the lease, and likewise trustees *ex maleficio* of the stock and of all moneys received by them in the form of dividends, the decree in holding them to an accounting for their wrongful conduct, must of necessity be a joint and several decree, holding each liable for the acts of the other; and hence Gillam would be liable under the decree which must be rendered, for all dividends which Dunn or his wife received, and Dunn would be liable for all dividends which Gillam or his wife received, and also for the seventy-five thousand dollars paid Gillam and his wife by Jake Hamon for stock in the company.

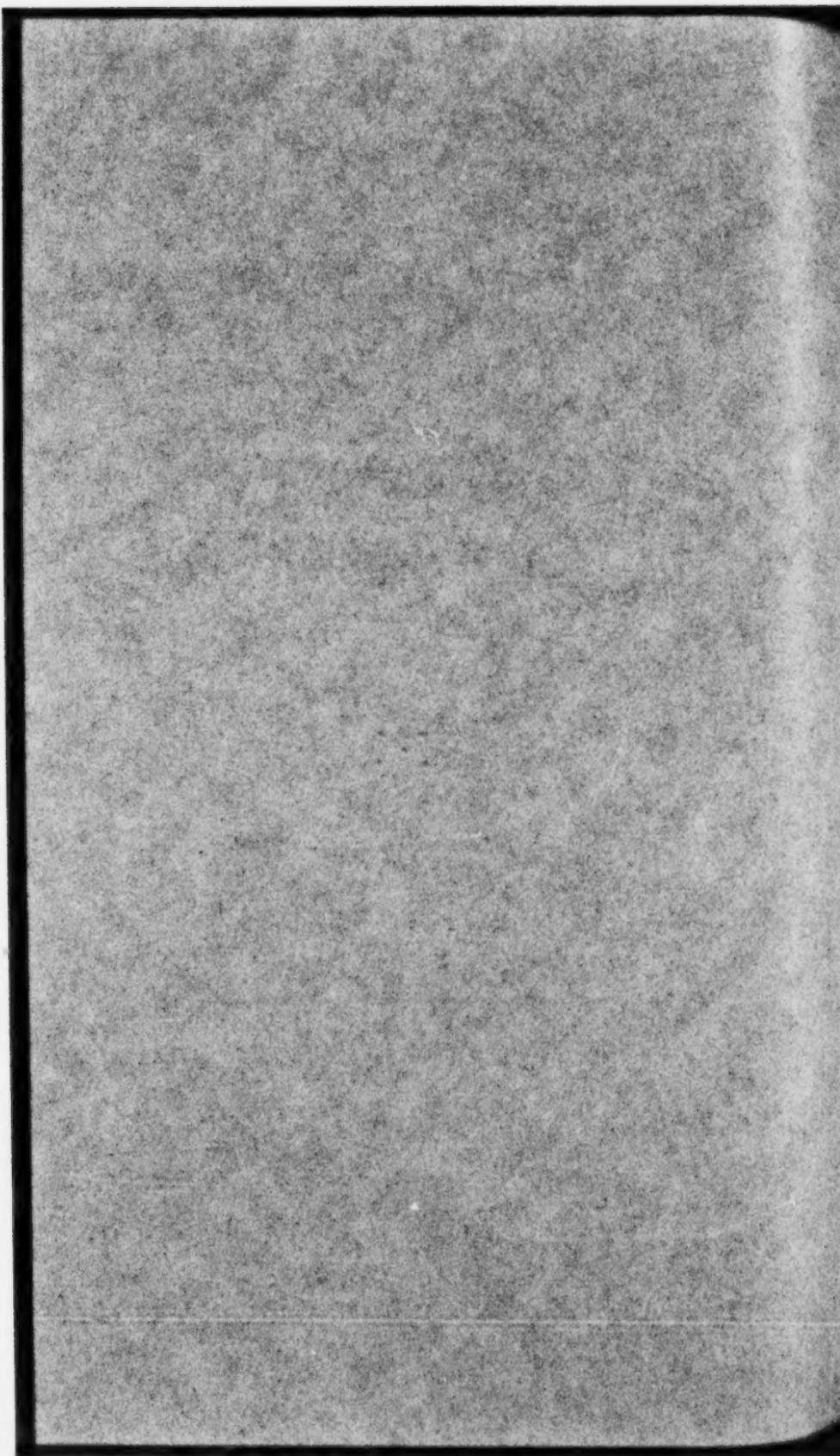
We respectfully submit that this cause should be reversed with instructions to the court below to require a full accounting on the part of Dunn and Gillam and their wives.

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No. 120

**In the Supreme Court of the
United States**

OCTOBER TERM, 1924

United States of America, Appellant,

vs.

T. H. Dunn, N. E. Dunn et al., Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.

**BRIEF FOR THE UNITED STATES OF AMERICA,
APPELLANT, IN REPLY TO BRIEFS FOR
THE APPELLEES.**

First Proposition.

Since the briefs were filed for appellees in this Court the Supreme Court of Oklahoma has decided two important and controlling questions against their contentions, and thus rendered nugatory the first sixty-two and one-half pages of their briefs. ^{on} January 7, 1925, the Supreme Court of Oklahoma held (a) that

the county court of LeFlore County, Oklahoma, had the power and jurisdiction to appoint a guardian of the person and estate of the Indian minor Allie Daney, and that such guardian under that appointment had the power to sell the real estate of the minor with the approval of that court; and (b) that J. J. Eaves, the curator of the estate of Allie Daney under the appointment by the United States court for the Indian Territory, before Oklahoma was admitted into the Union, did not have the exclusive control and management of her estate and was not the sole and exclusive authority by which the real estate of the minor could be sold.

In the brief for the appellees the contention is stressed that the appointment of A. N. Thomas as guardian of Allie Daney on July 24, 1911, by the County Court of LeFlore County, was illegal and void; that the estate of Allie Daney was not in any way bound by the oil and gas lease executed on the 18th or 19th of August, 1913, by A. N. Thomas as such guardian to T. H. Dunn and J. Robert Gilliam, and that the lessees therein acquired no rights under the lease; and hence ^{the fact} that the lease was procured by fraud in that the lessees bribed the guardian to execute it furnished no cause of action in a court of equity to cancel the lease or to hold the lessees to an accounting for the profits accruing to them from the lease.

Counsel for the appellees say it is undisputed that A. N. Thomas was not the legal guardian of

the person and estate of Allie Daney when the lease was executed, and that the execution of the lease to Dunn and Gillam by a *pseudo* or counterfeit guardian, no matter how fraudulently obtained, created no actionable wrong in favor of Allie Daney; that Dunn and Gillam occupied no fiduciary relationship to Allie Daney and having obtained nothing from her by reason of the lease can not be held as trustees of any property, right, interest or profit acquired by them in consequence of the lease.

As a correlative to this contention counsel assert that one J. J. Eaves, who was appointed curator of the estate of Allie Daney, in the month of November, 1905, by the United States Court of the Indian Territory had the exclusive right and power to control and manage the estate of Allie Daney and to execute oil and gas leases on the land.

The contention that the appointment of A. N. Thomas, as guardian of Allie Daney, was illegal and void is largely an afterthought. In their answers in the court below they do not deny the jurisdiction of the county court of LeFlore County, Oklahoma, to appoint a guardian of the estate of Allie Daney nor do they deny the jurisdiction of that court to administer on the estate of Allie

Daney. In their answer they rather affirm than deny the jurisdiction of the county court of LeFlore County, Oklahoma, to appoint a guardian of her estate and to administer upon it. For instance, in the second paragraph of the answer of T. H. Dunn and N. E. Dunn it is alleged:

"That the allegations in the complaint show that the county court of LeFlore County, Oklahoma, and the Secretary of the Interior have the sole and exclusive authority and jurisdiction over the alleged cause of action, if any is alleged, and this proceeding (the action by the United States to cancel the lease) is a collateral attack upon the judgment of said county court" (Trans. 45).

Again, in the eleventh paragraph of their answer T. H. Dunn and N. E. Dunn defend against the action by the United States to cancel the lease by alleging the circumstances under which it was executed, the agreement to pay bonus and royalty and that the lease was to be executed upon the blanks furnished by the Interior Department, subject to the approval of the county judge of LeFlore County, Oklahoma, where the minor and guardian lived; that a sale of the lease was regularly had before the county judge of that county and that T. H. Dunn and J. Robert Gillam were the highest bidders therefor; that the lease was regularly sold

to them and approved by the county judge, and no fraud of any character was perpetrated in securing such approval (Trans. 47).

The answer of J. Robert Gillam and his wife was even more conciliatory toward the validity of the appointment of A. N. Thomas as guardian of Allie Daney. In the fifth paragraph of their answer they say that the execution of lease by J. J. Eaves as curator for the estate of Allie Daney and the appointment and the approval thereof by the county court of Love County and the Department of the Interior made the lease a good and valid one "without the execution thereof by A. N. Thomas, the purported guardian; but if defendants are wrong in this, and if, as a matter of law, the authority of the said Eaves as curator had terminated at the time of the execution thereof by him, then and in that event, *and as a further defense herein, they say that the appointment of the said guardian A. N. Thomas was legal and valid, and that the execution of said lease by him, the said guardian, and its approval by the probate court of LeFlore County and its subsequent ratification and approval by the Indian agency at Muskogee and by the Secretary of the Interior, was valid and binding and suf-*

ficient to pass a good title to said lease'' (Trans. 53-54).

It thus appears that the appellees in the court below put but little reliance upon the invalidity of the appointment of A. N. Thomas as guardian of the Indian minor, but their answers and the evidence contained in the record shows that their main defense on the trial consisted of a denial of fraud in the procurement of the lease. It further appears that after the evidence was taken and the trial court decided against them on that issue they seized upon the alleged invalidity of the guardianship proceedings as the chief and practically the only ground upon which they hoped to sustain the judgment dismissing the government's bill.

The shift by appellees from one defense in the court below on which they were defeated to another in this Court would probably be justified if the defense which they urge here was a good one. They do not deny now the fraud in the procurement of the lease, but they insist that the fraud which Dunn and Gillam committed in procuring the lease from A. N. Thomas, as guardian, cannot be made the basis of an action to vacate the lease because Thomas was a *pseudo* or counterfeit guardian; that

his appointment was a nullity and that they got nothing by reason of the oil and gas lease which he executed to them. They insist in this connection that all the rights they got under the oil and gas lease resulted from the fact that J. J. Eaves, as curator of the Indian minor, signed his name to the lease about five months after Thomas, acting as guardian for Allie Daney, executed the same.

In the light of these contentions on behalf of the appellees the decision of the Supreme Court of Oklahoma in the case of *Allie Burton, plaintiff in error, v. Winnie Collie et al., defendants in error*, decided in January of this year, is important. In that case the Oklahoma Supreme Court held that the county court of LeFlore County after the admission of Oklahoma into the Union had the power and jurisdiction to appoint A. N. Thomas guardian of the Indian minor, and that under that appointment and with the approval of that court A. N. Thomas, as such guardian, had the authority to sell the real estate of the minor situated in Love County, Oklahoma. The court also held that the appointment of J. J. Eaves as curator of the estate of Allie Daney by the United States Court for the Indian Territory before Oklahoma was admitted

into the Union did not confer on him the exclusive power to sell the real estate of the minor. That decision has not been as yet officially reported. We have therefore taken the liberty to append to this brief a certified copy of the decision.

The historical background of this decision consists in the facts that prior to the admission of Oklahoma into the Union, Congress had extended over the Indian Territory certain chapters of the statutes of Arkansas as contained in Mansfield's Digest, published in 1884. Among the Arkansas laws thus extended over to the Indian Territory, were those relating to the administration of the estates of deceased persons and to guardianship of minors (See. 31, Act of Congress, Approved May 2, 1900, 26 Stat. L. 81).

One of the Chapters of Mansfield's Digest thus extended to the Indian Territory was Chapter 73, relating to guardians and curators, and the Act of Congress expressly provided that the United States in the Indian Territory should appoint guardians and curators.

All this was done under the authority of the United States. When the State government was organized it provided in its Constitution and its

statutes its own system for the administration of the estates of deceased persons and guardianship of minors. It created county courts and conferred on them full and complete probate jurisdiction and authorized them to appoint guardians over the estates of minors.

Before the admission of the State into the Union, the Indian Territory was divided into three judicial districts, and the judges appointed under authority of Congress were charged with the duty of administering the laws of the United States in their area. On the admission of the State, the Indian Territory was divided into forty counties and provision was made for a county court and the election of a county judge in each county. The county court and the county judges administer the Constitution and the laws of the State in probate matters, including the guardianship of the estates of minors. Each county court is given the power to appoint guardians of the estate of all minors domiciled in the county.

Section 23 to the Constitution provides for the transfer of proceedings in the matter of the administration of estates and guardianships of minors pending in the United States courts in the Indian

Territory to the county courts in the State, and by inference continued in office after Statehood curators appointed under the Arkansas laws. There is nothing in the Constitution or in any act of the Oklahoma Legislature which makes exclusive the powers or jurisdiction of the curators thus continued in existence in the State. So that when the curatorship proceedings which originated on the estate of Allie Daney before Statehood were transferred to the county court of Love County, Oklahoma, that court did not acquire exclusive jurisdiction to order J. J. Eaves, the curator, to sell an oil and gas lease on the land of this minor, but the jurisdiction of that court did become concurrent with the jurisdiction of LeFlore County, Oklahoma, in the matter of the sale of the real estate of this minor.

This precise point was decided by the Supreme Court of Oklahoma, in *Allie D. Burton v. Winnie Collie et al.*, *supra*. On this question the court said:

“The enabling act and Section 23 of the schedule to the Constitution had the effect of continuing the jurisdiction, then being exercised by the Federal Court sitting at Marietta, in the county court of Love County. The right of the county court of Love County to exercise jurisdiction over the subject matter was not made to depend upon the county court of Le-

Flore County withholding the exercise of its jurisdiction over the same subject matter, nor is the right to exercise probate jurisdiction granted by the two sections (Sections 12 and 13 of the Constitution) to LeFlore County, made to depend upon the county court of Love County withholding its right to exercise jurisdiction over the subject matter situated in LeFlore County. The effect of the enabling act, Section 23 of the schedule to the Constitution. Sections 12 and 13 was to vest concurrent probate jurisdiction over the subject matter involved in this action in the county courts of Love and LeFlore counties."

It appears that the county court of LeFlore County had ordered the sale of a tract of land belonging to the same Indian minor whose lands are involved in this controversy. The land was situated in Love County, and she contended that the fact that the curatorship proceedings in which J. J. Eaves was acting as curator excluded the jurisdiction of the county court of LeFlore County to order the sale of her land, and she sued to set the sale aside on that ground. In refuting that contention the Supreme Court said:

"The answer to plaintiff's contention is that the constitutional provision does not provide that the exercise of jurisdiction by one court, should exclude the constitutional right of the other court to take jurisdiction over the same subject matter; the Constitution does not ex-

pressly or impliedly provide that any agency or means should impair the jurisdiction granted to either county court; consequently, it would require the adoption of a constitutional amendment by the people to impair the grant made by the original instrument."

The court then refers to a number of other decisions in which it was claimed the court had held that the pendency of administration proceedings or guardianship proceedings in one county excluded every other county in the state from exercising jurisdiction in probate and guardianship matters, and on that point said:

"The court in the Dewalt case did not say that it was the act of invoking the jurisdiction of any county court, that excluded the right of every other county court to exercise jurisdiction in relation to the subject matter. The county court in the Dewalt case was exercising the jurisdiction granted to it by Sections 12 and 13 (of the Constitution) and was the only county court which could exercise jurisdiction in relation to the subject matter by the terms of the Constitution. We, again, repeat that the court in the Dewalt case did not say that it was the act of invoking the jurisdiction of one county court that denied the right to all other county courts to exercise jurisdiction in relation to the same subject matter. There was no cause pending in relation to the subject matter involved in the Dewalt case, in a Federal court, at the time this State was created; consequently, by the terms of the Con-

stitution, as the minor resided in Wagoner County, the county court of that county was the only county court in the State vested with jurisdiction over the subject matter. It was not the act of instituting the guardianship proceedings in the county court of Wagoner county that excluded the right of every other county court to appoint a guardian and order the sale of property belonging to the estate, but it was the fact that no other county court was vested with jurisdiction to act by the terms of the Constitution. * * * The plaintiff undertakes in this case to use the expression made in the cases involving the consideration of the jurisdiction granted by Section 13, as limited by Section 12, as being applicable to the question of the county court succeeding to the jurisdiction then being exercised by the Federal court at the time of the creation of Statehood. If we permitted the plaintiff to give the foregoing cases effect as applied to the question of jurisdiction, continued by Schedule 23, in the county courts as successors to the Federal courts, it would have the effect of destroying the jurisdiction granted by Section 13 to the county courts situated in counties where the minors reside. The plaintiff falls into error through the misconstruction of the language used in the case of *Baird v. England, supra*, and similar cases."

After pointing out that it was conceded in that case that the domicile of Allie Daney was in LeFlore County, the court said:

"The plaintiff's right to recover must fail, if she stands alone on the proposition of want

of jurisdiction in the county court of LeFlore County. But we will go farther, and consider whether plaintiff may raise the question here, that two actions were pending, at the same time, in separate courts, covering the same subject matter.

“A plea in abatement does not pre-suppose that one of the courts does not have jurisdiction of the subject matter. The plaintiff would not suffer injury in her property or personal rights, if one of the courts did not have jurisdiction. The office of a plea in abatement is to prevent one of the courts, which has jurisdiction, from exercising the same over the particular matter.

“The effect of two courts exercising jurisdiction over the same subject matter was considered in the case of *McDougal v. Panther Oil and Gas Co.*, 273 Fed. 113. It was said by the court, that: ‘Where two actions between the same parties involving the same cause of action proceeds at the same time in courts of concurrent jurisdiction, it is not the judgment in the action first brought, but the first final judgment, although that may be in the action last brought, that renders the issues *res judicata* in both actions.’

“If a plea in abatement is not offered in one of the pending causes, the judgment first rendered is valid and final.

“The action of the plaintiff is a collateral attack on the judgment rendered by the county court of LeFlore County, which is a court of general jurisdiction, and entitled to be accorded all the presumptions indulged in favor

of the judgment of a district court. *Holmes v. Holmes*, 27 Okla. 140, 111 Pac. 220, 30 L. R. A. (N. S.) 920.

"In relation to a collateral attack upon a judgment rendered in the county court, in a probate proceeding, it was said in the case of *Moffett v. Jones*, 67 Okla. 171, 169 Pac. 652: 'In order for the plaintiff to prevail, he must establish that the court exceeded its jurisdiction, or that there was a want of jurisdiction to act. The distinction between what is requisite to authorize the court to act at all, and that which is necessary to sustain its action in a particular manner, must not be lost sight of, because it is only these matters, which renders the proceedings void, that are available here.'

"The following cases support the rule: *Pettis v. Johnson*, 78 Okla. 277; *Griffin v. Culp*, 68 Okla. 310, 174 Pac. 495; *Continental Gin Co. v. DeBord*, 34 Okla. 66; *Blackwell v. McCall*, 54 Okla. 96; *Rice v. Theimer*, 45 Okla. 618; *Rice v. Woolery*, 38 Okla. 199; *Edwards v. Smith*, 42 Okla. 544; *Cushing v. Cummings*, 72 Okla. 176, 179 Pac. 762."

Point One.

under which, beginning at page 11 of the brief for appellees, they make the contention that J. J. Eaves, the curator, was the only person empowered by law to execute an oil and gas lease on the land in controversy, since the decision of the *Burton v. Collie* case, *supra*, will no doubt be abandoned by counsel for appellees.

Point Two,

beginning at page 25 of the brief for appellees, in which they contend that two separate and distinct guardianships or curatorships cannot exist at the same time for one and the same person, will also in all probability be abandoned, since the Supreme Court of Oklahoma in the decision referred to above has held that it is competent for a guardianship of the estate of this minor to exist in the county of the residence or domicile of the ward at the same time a curatorship of her estate of the same was pending in Love County. Likewise, counsel for appellees will probably abandon their contentions under Point Three, beginning at page 33 of their brief. Under this point they stress the exclusive validity of the oil and gas lease executed by J. J. Eaves as curator of Allie Daney and the invalidity of the oil and gas lease by A. N. Thomas, to Dunn and Gillam, characterized him as "*a pseudo or counterfeit guardian*," and they say that a lease executed by such a guardian, no matter how fraudulently obtained, created no actionable wrong in favor of Allie Daney. Under this point they also assert that Dunn and Gillam occupied no fiduciary relation to Allie Daney, and having obtained nothing from her by virtue of the Thomas lease cannot

be held as trustees of any property or right, or interest acquired by them. We submit that the basis for all of the argument put forth under point three has been removed by the decision in the *Burton v. Collie* case, *supra*, and that this is particularly true with reference to the contention that Dunn and Gillam acquired no rights under the Thomas lease and that they therefore occupied no fiduciary relationship with reference to the estate of Allie Daney.

The authorities cited by us at pages 39 to 44 and 79 to 85 of our original brief sustain the proposition that the fraud which entered into the procurement of the lease in this case rendered the lease illegal and void insofar as the lessees Dunn and Gillam are concerned; illegal and void, regardless of any injury or absence of injury which the estate of the minor sustained. The record, however, as pointed out in our original brief, shows conclusively that the estate of the minor did suffer pecuniary loss to the extent of many thousands of dollars by reason of the fraud committed by the guardian and the lessees (see pages 67 to 86, original brief for appellant).

S e c o n d P r o p o s i t i o n .

The Bill of Complaint is entirely sufficient to warrant recovery against Dunn and Gillam in the nature of an accounting for the profits made by them on account of the fraudulent oil and gas lease procured by them and A. N. Thomas, as guardian of the Indian minor, Allie Daney.

The charge in the brief of the appellees that the complainant has shifted its base and is now asking for different relief against Dunn and Gillam from that prayed for in the bill of complaint is not justified. We are now seeking against Dunn and Gillam the relief prayed for in the bill. All the facts which constitutes the fraud committed by them in procuring the lease are set forth in detail in the bill and all the allegations contained in the bill were abundantly proven on the trial except that the Bullhead Oil Company had knowledge of the fraud at the time the lease was assigned to it and except the further allegation that all of the other defendants other than Dunn and Gillam, who were stockholders in the company, likewise had knowledge of the fraud.

The trial court held that the evidence did not sustain the charge that these parties had knowledge of the fraud and that they were innocent holders of the lease and the stock held by them in the com-

pany. Dunn and Gillam were the only defendants who were guilty of committing fraud in the procurement of the lease. They did not complain in the trial court of the insufficiency of the allegations of the bill charging fraud against them, nor did they object to the introduction of the evidence which sustained the charge of fraud.

The bill of complaint contained all of the allegations necessary and proper in an equitable action to cancel the fraudulent oil and gas lease and to recover the land for the Indian minor, and if the evidence on the trial had not failed to show notice of the fraud by the Bullhead Oil Company the lease would have been cancelled and the land recovered by the minor. The fact that Dunn and Gillam, the fraudulent lessees, assigned the lease to an innocent purchaser for value from whom they concealed the fraud committed by them in procuring the lease does not prevent a court of equity from pursuing the equitable remedies against them in the nature of an accounting for all profits derived from the transaction.

The authorities on this proposition are cited in our brief, at pages 88 to 95, and abundantly sustain the right of the complainant to an accounting against Dunn and Gillam.

To meet the possibility that it might appear from the evidence that the Bullhead Oil Company was an innocent purchaser for value of the lease there was inserted a prayer for alternative relief against Dunn and Gillam, in the fifth paragraph of the bill, wherein the complainant prays that if for any reason the court should hold that the lease described in paragraph five (bill of complaint) and shown in Exhibit A, cannot be cancelled, then plaintiff prays that the defendant stockholders be adjudged the holders of the said stock respectively in trust for said Allie Daney, and that Allie Daney be declared the rightful owner thereof and that plaintiff be awarded the custody thereof for her use and benefit. “* * * And that the defendants who are or at any time have been stockholders of the Bullhead Oil Company be required to account for all moneys received by them, respectively, either as dividends or as proceeds of sales of their stock.” This specific prayer is followed by a general prayer for such other and further relief as the plaintiff may be entitled to in equity and good conscience (Tran. 15-16).

If, however, it should now appear that there was any defect of allegation in the bill of complaint

this Court would treat it as having been amended to conform to the proof so as to enable the court to award the complainant all the relief justified by the facts.

On the proof as found by the trial court clearly it would be entirely equitable and in keeping with good conscience for the court to hold Dunn and Gillam to an accounting for the profits made by them on account of the fraudulent transaction disclosed by the evidence. This includes their part of the \$90,000, paid as the first dividend (Tran. 166), and all other dividends received by them, and also includes the \$75,000 which J. Robert Gillam received on the sale of his stock to Jake L. Hamon. On the other hand, it would be highly inequitable for Dunn and Gillam, the perpetrators of the fraud, to be permitted to escape with the profits made by them out of the transaction solely because by their machinations the lease had been assigned to an innocent purchaser and the complainant's right to have it cancelled thereby defeated.

Third Proposition.

The compromise and settlement made by the Attorney General and approved by the Secretary of the Interior with the Bullhead Oil Company and certain of its stockholders other than Dunn and Gillam and

their wives did not in any way affect the cause of action alleged in the Bill of Complaint against Dunn and Gillam and their wives, nor discharge Dunn and Gillam from their liability for an accounting for the profits received by them from the fraudulent oil and gas lease.

The final decree was rendered in this case in the court below on June 7, 1921, dismissing the government's bill as to all of the defendants. On August 22, 1921, the Bullhead Oil Company submitted an offer in writing to the Attorney General to compromise the case on the payment of \$45,000, for the benefit of the Indian minor, and \$12,500 as attorney's fees. This offer contained the condition that "in any appeal which the United States may prosecute from the decision of the United States Court for the Eastern District of Oklahoma, in the above styled cause, to the Circuit Court of Appeals, or to the Supreme Court of the United States, the United States will neither ask nor insist upon a reversal of said cause for a recovery against the Bullhead Oil Company or against any of the defendants in said cause save and except T. H. Dunn, N. E. Dunn, J. Robert Gillam and Mrs. J. Robert Gillam, and that it will not insist upon any judgment imposing a trust upon any of the stock in the Bullhead Oil Company, heretofore

owned by J. Robert Gillam or Mrs. J. Robert Gillam, and assigned to Jake L. Hamon, but will insist upon a money judgment as against them for whatever amount the testimony may show should be awarded" (Tran. 256-258).

The proposition was duly accepted and has been fully executed. The trial court had expressly held that the Bullhead Oil Company and the other defendants for whom the compromise was made, had not in any way participated in the fraud committed by Dunn and Gillam in procuring the lease and that they were innocent purchasers of the lease and the stock owned by them in the Bullhead Oil Company.

The trial court had also held that Dunn and Gillam were the only parties to the action who were guilty of fraud in the procurement of the lease, except A. N. Thomas, the faithless guardian. Clearly, in such a situation the complainant had the right to acquiesce in the decision of the trial court in holding that the defendants for whose benefit the compromise was made were innocent purchasers for value of the lease and stock in the company.

The complainant could have given effect to the conclusion of the trial court on that question by

failing to assign as error the action of the court in holding these parties to be innocent purchasers for value.

On the other hand, the defendants for whose benefit the compromise was made had the undoubted right to protect themselves against the possibility that the decision of the trial court on that question might be reversed, by paying to the complainant the sums of money mentioned in the offer of compromise. These transactions resulting in the settlement of the case among the innocent and righteous litigants were not subject to control by Dunn and Gillam, the guilty perpetrators of the fraud; and clearly, under the conditions then existing, the complainant had the right to continue the litigation against Dunn and Gillam and to appeal from the decision of the trial court discharging them from liability for an accounting for the profits derived by them from the oil and gas lease.

The bill of complaint alleged that all of the defendants were joint tort feasors, in the perpetration of the fraud which resulted in the execution of the lease and its assignment to the Bullhead Oil Company and the issuance of the stock in that company. The Circuit Court of Appeals held that the

complainant had the right to settle with some of the alleged joint tort feasors and forego litigation as to them, and cited *Carey v. Bilby*, 129 Fed. 203; *Barry v. Conklin*, 268 Fed. 177, and also held that the complainant had the right to reserve its cause of action against Dunn and Gillam.

Clearly, the complainant has that right, but Dunn and Gillam and their wives now insist that the compromise was detrimental to them because, being stockholders in the Bullhead Oil Company, the complainant had no right to take part of the money to which they were entitled as stockholders in that company and still prosecute the appeal against them.

The answer to that contention is that if Dunn and Gillam procured the oil and gas lease by fraud and their wives paid nothing for the stock, the oil and gas lease was at all times void as to them. The authorities cited at pages 39 to 44 of our original brief show conclusively that Dunn and Gillam at all times held the oil and gas lease and the stock which they claim in the Bullhead Oil Company as trustees for the use and benefit of Allie Daney. Their position on this point certainly ought not to appeal to a court of equity. Their counsel now

admit they procured the lease by fraud and that they carried the guilty purpose to perpetrate the fraud in their minds for more than two years, until in the months of August and September, 1915, they consummated the fraudulent arrangement by paying to the faithless guardian the bribe money, consisting of \$3,500 and a Saxon automobile.

These are the ultimate facts and they should control a court of equity in rendering its decision.

From the time the original oil and gas lease was executed on August 18 or 19, 1913, and the legal title was held in the name of Dunn and Gillam until August and September, 1915, when they finally consummated the fraudulent transaction, Dunn and Gillam were trustees of the beneficial interest in the lease and in the stock of the company for the estate of Allie Daney, as shown by the authorities cited in our original brief. A court of equity considers as having been done that which good conscience requires should be done, and that rule as applied to the facts in this case requires the court to treat the lease and the stock held by Dunn and Gillam as having been assigned to Allie Daney. Under this theory of the case, which is manifestly

the correct one, Dunn and Gillam never owned any stock in the Bullhead Oil Company and whatever stock they held in that company was subject to a trust in favor of Allie Daney. Hence, Dunn and Gillam were not in any respect whatever injured by the compromise complained of.

Respectfully submitted,

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APPENDIX.

(Filed in Supreme Court of Oklahoma, January 7, 1925. William M. Franklin, Clerk.)

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Allie Burton, Plaintiff in Error, vs. Winnie Collie et al., Defendants in Error.—No. 14,841.

SYLLABUS.

1. The effect of the Enabling Act and Section 23 of the schedule of our Constitution, was to cause the county courts to succeed the Federal courts, situated in the counties of the particular county courts, in the exercise of probate jurisdiction, which was being administered by the Federal courts at the time this State was created.
2. The general grant of probate jurisdiction as expressed by Section 13 of Art. 7, and as limited by the provisions of Section 12 of Art. 7 of our Constitution, operated to vest each county court with probate jurisdiction over the subject matter situated in the county.
3. The effect of the terms and provisions of the Enabling Act, Section 23 of the schedule, Sections 12 and 13 of Art. 7, of our Constitution, was to vest probate jurisdiction over the estate of this plaintiff, in the county courts of Love and LeFlore counties.

4. Probate jurisdiction over the estate of the plaintiff was vested in the county courts of Love County and LeFlore County without limitations; consequently, the exercise of jurisdiction over the subject matter by one of the courts did not exclude the right to exercise the constitutional jurisdiction granted to the other court.

5. Record examined. *Held*, to support the judgment of the trial court in favor of the defendants.

Syllabus by Stephenson, C.

Error from the District Court of Love County.
Hon. Asa E. Walden, Judge.

Action by Allie Daney Burton in ejectment against Winnie Collie, executrix, Winnie Collie, Queen Sullivan, Clemmie Bailey, Mable Chapman, Jewell Collie, Carson D. Collie, Joe C. Collie and Winnie Collie. Judgment for defendants. Plaintiff brings error.

Affirmed.

Adams & Orr, for plaintiff in error; Moore & West, for defendants in error.

Opinion by STEPHENSON, C.: Allie D. Burton, of Indian blood, plaintiff in error, who was plaintiff below, was the owner by inheritance of the lands involved in this action. The lands were situated in the southern Federal district. The plain-

tiff, who was a minor, resided with her father in that portion of the central Federal court district now known as LeFlore County. J. J. Eaves was appointed guardian of the plaintiff by the Federal court, sitting at Marietta, in the southern district, Nov. 8, 1905. This guardianship cause was pending in the Federal court at Marietta when Statehood was created, and was so pending when the county court of LeFlore County on or about Aug. 18, 1908, appointed the father of plaintiff as her guardian, and ordered the sale of the lands involved herein.

The county court of Love County obtained jurisdiction of the guardianship proceeding as successor to the Federal court's probate jurisdiction, sitting at Marietta, in Love County. The plaintiff commenced an action in ejectment against the defendants for the possession of the lands involved in this action, which were sold on the order of the county court of LeFlore County. The defendants are in possession of the lands and claim ownership by a deed of grant from the purchaser at the guardianship sale. The plaintiff does not allege that fraud was committed in the sale of the premises through the county court of LeFlore County,

nor is it asserted that the purchase price paid for the land was inadequate. The plaintiff rests her right of possession upon the single proposition that the county court of LeFlore County was without jurisdiction of the subject matter at the time the sale was ordered. The plaintiff rests her allegation that the court was without jurisdiction of the subject matter, upon the proposition that a guardianship cause was pending in the county court of Love County at the time her father was appointed as her guardian, in LeFlore County, and at the time the court ordered the sale of the real estate involved herein.

The cause came on for trial and was submitted to the court upon the foregoing propositions. The trial resulted in a judgment for the defendants and the plaintiff has brought error to this court.

The plaintiff rests her right to the reversal of the cause upon the proposition, that the county court of LeFlore County was without jurisdiction to order the sale of the property.

The plaintiff is entitled to a reversal of the cause if she is correct in the assertion that the county court of LeFlore County was without jurisdiction of the subject matter.

Section 1 of Art. 7 of our Constitution determines the lodgment of the judicial power of the State in the following language:

“The judicial power of this State shall be vested in the Senate sitting as a court of impeachment, a Supreme Court, District Courts, County Courts, courts of Justices of the Peace, Municipal Courts, and such other courts, commissions or boards, inferior to the Supreme Court, as may be established by law.”

Probate jurisdiction was exercised, formerly, in the chancery courts of England, as an equitable proceeding. An act of parliament, later, divested the chancery court of probate jurisdiction, in part, and vested the subject matter in the spiritual court. A portion of the probate jurisdiction was left in the chancery courts. The act divesting the chancery court of a portion of its probate jurisdiction was strictly construed by the courts. The rule of construction was, that the spiritual court took only such probate jurisdiction as was expressly granted, or was necessary to give effect to the express grant of jurisdiction. Legal and equitable jurisdiction is lodged in our district courts; consequently, if probate jurisdiction was not expressly granted by the Constitution to some other court, our district court would administer probate juris-

diction through its equitable jurisdiction under the provisions of Section 1, *supra*; Pomeroy's *Equity Jurisprudence*, 2nd ed., Sec. 1154, page 1745; *Resenberg v. Frank*, 58 Calif. 387.

The fact that the exercise of probate jurisdiction is in the nature of an equitable proceeding, explains the reason why this court said in *Dewalt v. Cline*, 35 Okla. 197, 128 Pac. 121, "that the county court having acquired jurisdiction of the subject matter had jurisdiction co-extensive with the State in the management and control of the minor's or decedent's estate." A recognized doctrine in equitable jurisprudence is that the court in an equitable action, relating to a trust, or in the administration of a trust, estate, is authorized to give its orders and judgments effect beyond its territorial jurisdiction, if the parties involved have been personally served and are before the court. *Cole v. Cunningham*, 133 U. S. 107, 33 U. S. (L. ed) 536; *Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 416; *Fall v. Fall*, 75 Nebr. 120, 113 N. W. 176, 121 A. S. R. 767; *Pillow v. S. W. Virginia Imp. Co.*, 92 Va. 144, 23 S. E. 32, 53 A. S. R. 804; *Proctor v. Proctor*, 215 Ill. 275, 74 N. E. 145, 106 A. S. R. 168, 2 Ann. Cas. 819, 69 L. R. A. 673; *Wilhite v.*

Skelton, 149 Fed. 67 (C. C. A.); *British So. Africa Co. v. De Beers Consol. Mines* (Eng. case), 20 Ann. Cas. 461.

The county court, in a guardianship cause, or administration cause, has the interested parties before it. It may enter its orders effecting the interests of the parties in the property involved in the estate situated in any county in the State. This power does not flow from any express constitutional or statutory grant to the county court. The power of the court to give extra territorial effect to its orders flow from the nature of the proceeding. But it must be borne in mind, as we have said before, that the constitutional or statutory grants of probate jurisdiction to the county court should be strictly construed. The fact that probate jurisdiction is in the nature of an equitable proceeding does not authorize the county court to exercise a greater jurisdiction than that granted to it by the express provisions of the Constitution, or that necessary to give effect to the powers expressly granted.

Section 13 of Art. 7, of our Constitution grants probate jurisdiction to the county court, and is in the following language:

“The county court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis*, and common drunkards; grant letters, testamentary and of administration, settle accounts of executors, administrators, and guardians; transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, including the sale, settlement, partition, and distribution of the estates thereof.”

It will be observed that the grant of probate jurisdiction is general to all county courts of the State. No distinction is made in relation to particular subject matter as between the several county courts to be established. The effect of the general language as used, is to vest all county courts with probate jurisdiction without reference to the location of the particular subject matter. The effect is, to make the jurisdiction of all county courts concurrent in relation to any subject matter. The effect of this general language would authorize any county court of the State to entertain an application for the appointment of a guardian for minors residing in Oklahoma County. The language of Section 13, *supra*, is making a general grant of probate jurisdiction to the county courts, corresponds to the language used in Section 10, Art. 7,

in making the general grant of jurisdiction to the district courts. The section in part reads in the following language:

“The district courts shall have original jurisdiction in all cases, civil and criminal, except where exclusive jurisdiction is by this Constitution, or by law, conferred on some other court.”

While the plaintiff may institute his action in any district court of the State for the recovery of a debt against a defendant, the Legislature has the power to compel the plaintiff to invoke the jurisdiction of some district court convenient to the residence of the defendant. The venue statute creates a personal privilege in favor of the defendant, which he may assert or waive. So, the venue statutes do not destroy the jurisdiction of the subject matter granted to all other district courts of the State. The plaintiff may, after the passage of the venue statute, institute his action in any district court of the State, unless the defendant asserts his personal privilege to have the cause tried in the district court within the established venue. Since all district courts in the State have jurisdiction of the subject matter, the plaintiff may institute an action in more than one court covering the same

subject matter. The remedy of the defendants would be to file a plea in abatement in one of the actions. *Burns v. Smith*, 21 Mont. 251, 53 Pac. 742; 69 A. S. R. 653; *Lamberton v. Pereles*, 87 Wis. 449, 58 N. W. 776; 23 L. R. A. 824.

A guardianship action is a proceeding in the interest of the minor and his estate. The guardian takes the minors into court with him by the application, which invokes the action of the court's jurisdiction over the subject matter submitted. *Moffer v. Jones*, 67 Okla. 171, 169 Pac. 652; *Ross v. Breeene*, 88 Okla. 37, 211 Pac. 422.

The general grant of jurisdiction to the county courts of the State might result in an action covering the same subject matter being instituted and maintained in two courts at the same time, but the guardian in each action has his remedy by way of filing a plea in abatement in the other action.

The Federal Constitution makes a grant of general jurisdiction to all the Federal courts of torts effecting personal rights in certain cases. The constitutional grant of jurisdiction does not confine its exercise to any particular court by reason of territorial location of the subject matter. Congress passed an act requiring certain actions in-

volving torts to be instituted and maintained in the Federal court, either, in the district of the residence of the plaintiff or that of the defendant. This act was a venue statute for the benefit of the defendant. It did not destroy the constitutional grant of general jurisdiction by the terms of the Constitution. The defendant might assert or waive the personal privilege created for his benefit by the venue statute. The plaintiff might maintain his action in any Federal court of the United States, after the passage of the venue statute, if the defendant did not assert his personal privilege. *General Investment Co. v. Lake Shore*, 260 U. S. 261, 67 L. ed. 244; *Lee v. C. & O. R. R. Co.*, 260 U. S. 653, 67 L. ed. 443.

We have discussed the effect of the general terms or grant of jurisdiction as expressed by Section 13, *supra*, without reference to any constitutional limitation. We have done this for the reason that the general grant of jurisdiction as contained in Section 13, *supra*, corresponds with the general grant of jurisdiction to the district court as made by Section 10, *supra*, and the general grant of jurisdiction as made by the Federal Constitution to the Federal courts.

A probate proceeding would be a civil action, if probate jurisdiction had remained in the district courts. The fact that one action was pending in some district court, would not destroy the constitutional jurisdiction of other district courts in relation to the same subject matter.

If a probate action was pending in more than one district court covering the same subject matter, the remedy of the proper party would be to file a plea in abatement in the other action. *Lamberton v. Pereles, supra.*

The Constitution does not provide that the pendency of an action in relation to some particular subject matter should destroy the jurisdiction granted to other courts of the same class in relation to the same subject matter. Since the Constitution does not make a distinction between the administration of general jurisdictional grants as between district courts, and county courts, the county court would be governed by the same rule that would apply in district courts.

We again refer to the question that the grant of probate jurisdiction to the county court must receive strict construction. It will be observed that Section 13, *supra*, authorizes the county court to

probate wills, but the strict rule of construction precludes the county court from construing wills. The specific grant of jurisdiction to the county court to probate wills does not imply the grant of jurisdiction to construe the wills, as the question of construction is aside from the matter of the formal requisites to make a valid will. The question of construction is for the district court, where the equitable jurisdiction remains to construe wills. We might say that the express grant of Section 13, has left in the district court that portion of its original probate jurisdiction to construe wills.

We have discussed Section 13, *supra*, as a general grant of probate jurisdiction to the county courts, for the reason that the Enabling Act and Section 23 of the schedule to the Constitution provided that the county court of Love County should succeed the Federal court sitting at Marietta, in the exercise of jurisdiction in pending probate causes. Jurisdiction of the subject matter was so continued in the county court of Love County, although there should be a constitutional limitation of the general grant contained in Section 13, *supra*. The general grant of probate jurisdiction as made by Section 13, *supra*, is limited by the terms and

provisions of Section 12, of Art. 7, in the following language:

“The county court, *co-extensive with the county*, shall have *original jurisdiction* in all probate matters, and until otherwise provided by law, shall have concurrent jurisdiction with the district court in civil cases in any amount not exceeding One Thousand Dollars, exclusive of interest.”

The effect of Section 12 is to limit the general jurisdiction as granted by Section 13, to the appointment of guardians for minors, incompetents, lunatics, etc., who reside in the county in which the court is situated. Section 13 authorizes the county court to control the estates of minors, and to order the sale of their interest in lands. The effect of Section 12, as a limitation, is to confine each county court to the exercise of probate jurisdiction over minors residing in the county, but the subject matter being in the nature of an equitable proceeding, the court is authorized to make orders and enter judgments effecting lands of minors, which are situated beyond the territorial limitations of jurisdiction. Consequently, the expression of the court in the Dewalt case, “that the appointment of a guardian or an administrator gives the court control over the lands belonging to the estate where-

ever situated in the State." The power to so deal with the lands of the minors, does not flow from an express constitutional grant, but inheres in the nature of the subject matter submitted to the court. When these two sections are construed together, the effect is to confine the jurisdiction of each county court to the subject matter situated within the county, subject however, to the equitable rule applying in the administration of a trust. The right of the county court to exercise such jurisdiction over the subject matter situated in the county is not made to depend upon any condition, other than the residence of the minor in the county. The sections do not authorize the Legislature to change or modify the jurisdiction vested in the county courts by the two sections. "The Enabling Act and Section 23 of the schedule to the Constitution had the effect of continuing the jurisdiction, then being exercised by the Federal court sitting at Marietta, in the county court of Love County. The right of the county court of Love County to exercise jurisdiction over the subject matter *was not made to depend upon the county court of LeFlore County withholding the exercise of its jurisdiction over the same subject matter, nor is the right to ex-*

ercise probate jurisdiction granted by the two sections to LeFlore County made to depend upon the county court of Love County withholding its right to exercise jurisdiction over the subject matter situated in LeFlore County. The effect of the Enabling Act, Section 23 of the schedule of the Constitution, Sections 12 and 13, was to vest concurrent probate jurisdiction over the subject matter involved in this action in the county courts of Love and LeFlore counties." No limitations are contained in the several sections in relation to either county court having exclusive jurisdiction in the exercise of its right of jurisdiction over the subject matter. It is probably true that the framers of the Constitution may have contemplated that the jurisdiction of both courts might be invoked in the control and management of the subject matter, in this and similar cases, but they no doubt, intended that the jurisdiction granted by the Constitution should be administered in accordance with the rules of civil practice as existed at common law, and as contained in the statutes adopted by the Constitution. The effect of the rules of civil procedure, in such a situation, was to give any complaining party the right to abate one, or the other of the proceedings.

But the complaint of the plaintiff is not that both courts attempted concurrently, to exercise jurisdiction to sell the property. The plaintiff rests her right to recover in this action upon the proposition that the county court of LeFlore County did not have jurisdiction of the subject matter, and the right to order the sale of the lands involved in this action.

The plaintiff seeks to avoid the effect of the constitutional provisions granting jurisdiction of the subject matter to the county court of LeFlore county, by asserting that the exercise of jurisdiction over the same subject matter by the county court of Love County, excluded the right of the county court of LeFlore County to order the sale. The answer of the plaintiff in this respect, is equivalent to the claim on the part of the plaintiff, that the act of invoking the jurisdiction of Love County, had the effect of destroying the constitutional jurisdiction of LeFlore County. The answer to plaintiff's contention, is that the constitutional provision does not provide that the exercise of jurisdiction by one court, should exclude the constitutional right of the other court to take jurisdiction over the same subject matter; the Constitution does

not expressly or impliedly provide that any agency or means should impair the jurisdiction granted to either county court; consequently, it would require the adoption of a constitutional amendment by the people to impair the grant made by the original instrument.

The several sections of the Constitution should be construed to give effect to the several provisions according to the expressed or apparent intention of the framers of the Constitution, according to the nature of the subject matter to which the several sections relate. We would not be justified in reading an exception by implication into these several sections, which had the effect of destroying the jurisdiction of one of the courts, granted to the two county courts by the express provisions of the several sections. *State v. Hooker*, 22 Okla. 712, 98 Pac. 964; *DeHasque v. A. T. & S. F. Ry. Co.*, 68 Okla. 123, 173 Pac. 73; *Leech v. State*, — Okla. —, Criminal Court, page, 188 Pac. 118. This court in the Dewalt case used the following expression:

“The county court in acquiring jurisdiction of the estate or *rem* had jurisdiction co-extensive with the State in the settlement of the estate of the decedent and the sale and distribution of his real estate, *and excluded the jur-*

isdiction of the county court of every other county."

The court in the Dewalt cause did not say that it was the act of invoking the jurisdiction of any county court, that excluded the right of every other county court to exercise jurisdiction in relation to the subject matter. The county court in the Dewalt case was exercising the jurisdiction granted to it by Sees. 12 and 13 and was the only county court which could exercise jurisdiction in relation to the subject matter by the terms of the Constitution. We again repeat that the court in the Dewalt case did not say that it was the act of invoking the jurisdiction of one county court that denied the right to all other county courts to exercise jurisdiction in relation to the same subject matter. There was no cause pending in relation to the subject matter involved in the Dewalt case, in a Federal court, at the time this State was created; consequently, by the terms of the Constitution as the minor resided in Wagoner County, the county court of that county was the only county court in the State vested with jurisdiction over the subject matter. It was not the act of instituting the guardianship proceedings in the county court of Wagoner County that ex-

cluded the right of every other county court to appoint a guardian and order the sale of property belonging to the estate, but it was the fact that no other county court was vested with jurisdiction to act by the terms of the Constitution.

The language used in the Dewalt case was given effect in the case of *Baird v. England*, — Okla. —, 205 Pac. 1098, in the following language:

“The county court of the county in which application is first made for letters testamentary or of administration in any the cases mentioned above shall have jurisdiction co-extensive with the State in the settlement of the estate of the decedent and the sale and distribution of his real estate and excludes the jurisdiction of the county court of every other county.”

The same expressions were given effect in the cases of *Parmenter v. Rowe*, — Okla. —, 200 Pac. 683; *Hathaway v. Hoffman*, 53 Okla. 73, 153 Pac. 184; *Welch v. Facht*, — Okla. —, 171 Pac. 731; L. R. A. 1918D, page 1163; *Monahawee et al. v. Hazelwood, County Judge*, 81 Okla. 69, 196 Pac. 937; *Crowell v. Hamilton*, — Okla. —, 209 Pac. 395.

The foregoing cases involve the consideration of the question of jurisdiction granted by Section 13, as limited by Section 12. The consideration of the

question of the jurisdiction granted to the county court by schedule 23 of the Constitution, was not involved in the foregoing cases.

The plaintiff undertakes in this case to use the expression made in the cases involving the consideration of the jurisdiction granted by Section 13 as limited by Section 12, as being applicable to the question of the county court succeeding to the jurisdiction then being exercised by the Federal court at the time of the creation of Statehood. If we permitted the plaintiff to give the foregoing cases effect as applied to the question of jurisdiction, continued by Schedule 23, in the county courts as successors to the Federal courts, it would have the effect of destroying the jurisdiction granted by Sec. 13, to the county courts situated in counties where the minors reside. The plaintiff falls into error through the misconstruction of the language used in the case of *Baird v. England, supra*, and similar cases.

The plaintiff has attacked the right of the defendants' possession of the lands involved in this suit by a law action. There are no equitable questions involved. The plaintiff must stand or fall upon the ground she has selected to offer combat against

her adversaries. She has elected to make her right of recovery to depend upon the want of jurisdiction in the county court of LeFlore County, to order the sale of the lands. The plaintiff admits that she was a resident at all times of LeFlore County, consequently, the latter court had control and jurisdiction of the subject matter, and the power to order the sale. The admission of the plaintiff that she was a resident of LeFlore County concedes jurisdiction in the county court of LeFlore County to appoint her father as her guardian, and to order the sale of the property. Therefore, the plaintiff has failed to establish the fact, which she charges, as supporting her right to recover. The plaintiff's right to recover must fall, if she stands alone on the proposition of want of jurisdiction in the county court of LeFlore County. But we will go farther and consider whether plaintiff may raise the question here, that two actions were pending, at the same time, in separate courts covering the same subject matter.

A plea in abatement does not pre-suppose that one of the courts does not have jurisdiction of the subject matter. The plaintiff would not suffer injury in her property or personal rights, if one of

the courts did not have jurisdiction. The office of a plea in abatement is to prevent one of the courts, which has jurisdiction from exercising the same power over the particular matter.

The effect of two courts exercising jurisdiction over the same subject matter was considered in the case of *McDougal v. Panther Oil & Gas Co.*, 275 Fed. 113. It was said by the court, that;

“Where two actions between the same parties involving the same cause of action proceeds at the same time in courts of concurrent jurisdiction, it is not the judgment in the action first brought, but the first final judgment, although that may be in the action last brought, that renders the issues *res judicata* in both actions.”

If a plea in abatement is not offered in one of the pending causes, the judgment first rendered is valid and final.

The action of the plaintiff is a collateral attack on the judgment rendered by the county court of LeFlore County, which is a court of general jurisdiction, and entitled to be accorded all the presumptions, indulged in favor of the judgment of a district court. *Holmes v. Holmes*, 27 Okla. 140, 111 Pac. 220, 30 L. R. A. (N. S.) 920.

In relation to a collateral attack upon a judgment rendered in the county court, in a probate proceeding, it was said in the case of *Moffer v. Jones*, 67 Okla. 171, 169 Pac. 652:

“In order for plaintiff to prevail, he must establish that the court exceeded its jurisdiction, or that there was a want of jurisdiction to act. The distinction between what is requisite to authorize the court to act at all, and that which is necessary to sustain its action in a particular manner, must not be lost sight of, because it is only those matters, which renders the proceedings void, that are available here.”

The following cases support the rule: *Pettis v. Johnson*, 78 Okla. 277; *Crifflin v. Culp*, 68 Okla. 310, 174 Pac. 495; *Continental Gin Co. v. DeBord*, 34 Okla. 66; *Blackwell v. McCall*, 54 Okla. 96; *Rice v. Theimer*, 45 Okla. 618; *Rice v. Woolery*, 38 Okla. 199; *Edwards v. Smith*, 42 Okla. 544; *Cushing v. Cummings*, 72 Okla. 176, 179 Pac. 762.

It is recommended that the judgment of the trial court be affirmed.

Per Curiam: The foregoing opinion by the Commission has been carefully examined by the Court, and finds that it should be adopted as the opinion of the Court.

Therefore, it is ordered by the Court that the opinion be and is hereby adopted as the opinion of the Court.

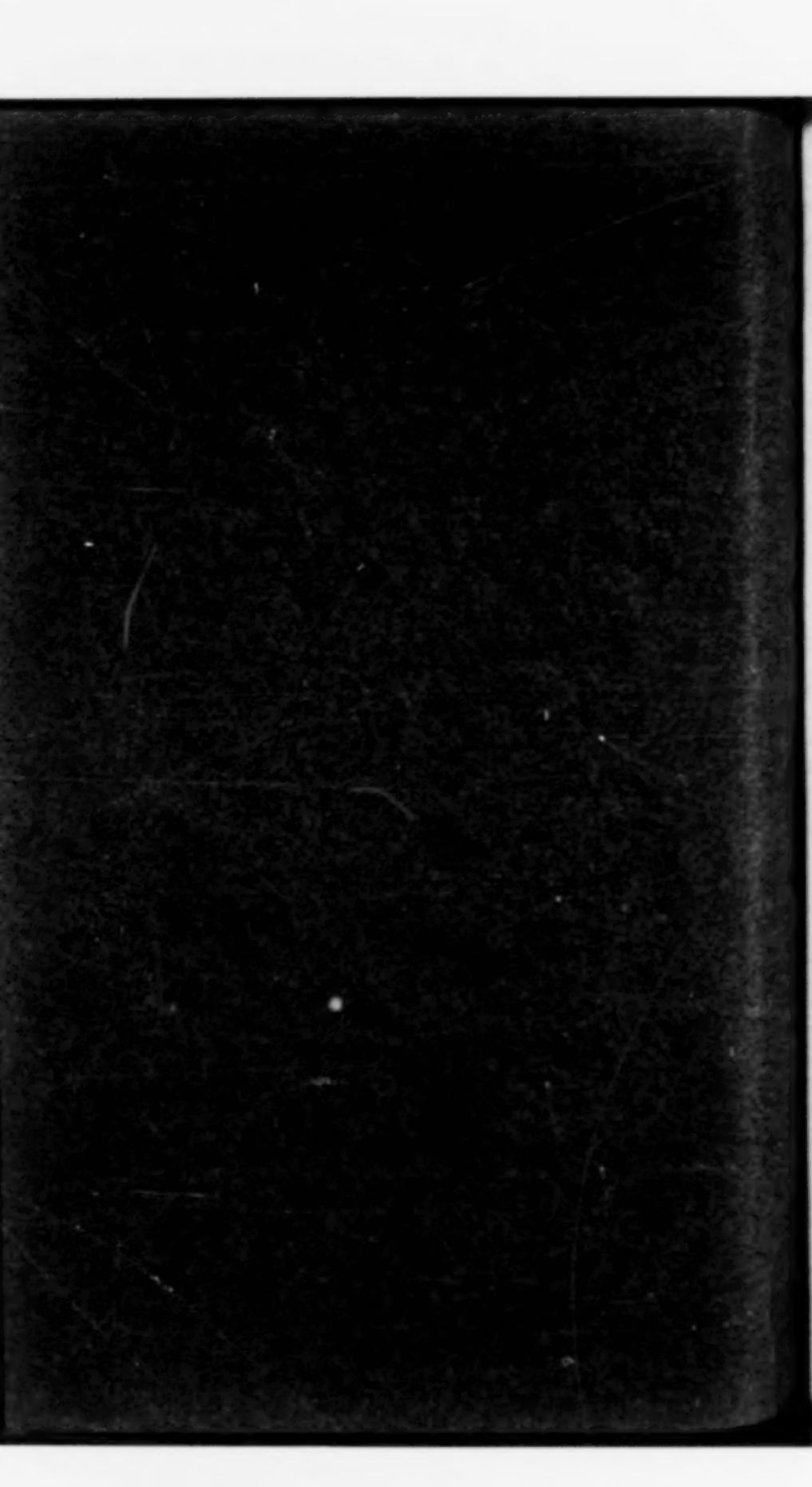
I, William M. Franklin, clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the opinion of said Court in the above entitled cause, as the same remains on file in my office.

In witness whereof I hereunto set my hand and affix the seal of said Court, at Oklahoma City, this 2nd day of February, 1925.

(Seal)

WILLIAM M. FRANKLIN,

By G. W. Satterfield.



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IN THE
SUPREME COURT OF THE UNITED STATES.
October Term, 1924.

No. 120.

UNITED STATES OF AMERICA, *Appellant,*
vs.
T. H. DUNN, N. E. DUNN, ET AL., *Appellees.*

**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.**

**BRIEF FOR N. E. DUNN AND T. H. DUNN,
APPELLEES.**

May It Please the Court:

The following undisputed facts and settled principles of law sustain the judgment dismissing the Government's bill, to-wit:

- (1) That at all times from November, 1905, until September, 1914, J. J. Eaves was the duly appointed, legal and acting curator, or guardian, of the estate of Allie Daney.

(2) That A. N. Thomas, who executed the Departmental oil and gas lease to Dunn and Gillam on August 19th, 1913, covering the 40 acres involved, subject to the approval of the Secretary of the Interior, was not then the legal guardian of the person and estate of Allie Daney and did not become such guardian until September 30th, 1914. (See Defs.' Exhibit 10, Rec., p. 227.)

(3) That on August 18, 1913, acting under the order of the Love County Court, J. J. Eaves, as curator or guardian of the estate of Allie Daney, executed a Departmental oil and gas mining lease to J. S. Mullen, subject to the approval of the Secretary of the Interior, said lease covering the same 40 acres described in the A. N. Thomas lease to Dunn and Gillam, and also 90 acres additional, making in all 130 acres (Rec., p. 214).

(4) That in accordance with the rules and regulations of the Secretary of the Interior, Dunn and Gillam filed their 40-acre Thomas guardianship lease in the office of the Indian Superintendent at Muskogee, Oklahoma, on August 22, 1913. (See Exhibit A, Rec., p. 16.)

(5) That in accordance with the rules and regulations of the Secretary of the Interior Mullen filed his lease in the office of the Indian Superintendent at Muskogee on August 23, 1913 (Rec., pp. 107 and 214).

(6) That Hon. Dana H. Kelsey, United States Indian Superintendent at Muskogee, after receiving the two conflicting leases, notified Dunn and Gillam and also Mullen of the filing of the conflicting leases, whereupon counsel for each of the competitive lessees appeared and filed briefs and argued the matter, each side contending that his lease was executed by the legal guardian—that is, Dunn and Gillam were contending that Thomas was the legal guardian, and Mullen was contending that Eaves was the legal guardian or curator. (See Plaintiff's Exhibit 15, Rec., pp. 106-107.)

(7) That Kelsey, Indian Superintendent, realizing that the Interior Department had no jurisdiction to enter any binding order or judgment determining which of the two conflicting guardians was the legal guardian and thereby authorized to lease the 40 acres of land in question, advised the parties that they should make some adjustment or compromise of their claims so as to unite their interest, or one or the other withdraw; and if this was not done, both leases would be disapproved.

(8) That the contest between Mullen and Dunn and Gillam developed into a bitter fight, each party being bull-headed, more or less, during which time oil development was approaching this 40 acres.

(9) That, as testified to by Kelsey (Rec., p. 171), Mullen called on him one day and "I told him (Mullen) that the matter had dragged along about

long enough, that there seemed to be no way of determining this matter without *disapproving both contracts*; that development had proceeded to such an extent that the land would be drained, and that I thought there certainly was a middle ground somewhere where the two parties could get together, have the guardians both join in one lease *or the other*, and allow operations to proceed, then let the guardians fight among themselves as to which was the proper person to receive the royalty; that if something along this line was not done very shortly *I would recommend the disapproval of both leases*, and do whatever I could to see that the two guardians adjusted their troubles among themselves, or both of them sell the lease over again to allow operations to proceed. Mr. Mullen at that time said there was some bitter feeling between the two parties and that he doubted they could get together."

(10) That under pressure from Kelsey, Indian Superintendent, Mullen approached Dunn and Gillam for an adjustment of their differences, which finally resulted in a compromise agreement along lines suggested by Kelsey, as Kelsey testifies, to-wit; that both guardians join in one lease, or Thomas, as guardian, execute the Eaves lease to Mullen, or Eaves execute the Thomas lease to Dunn and Gillam, and submit the joint lease to the Department for approval with an assignment to a corporation to be organized and the stock divided be-

tween the parties that is between Dunn and Gillam, and Mullen.

(11) That such a corporation was organized and named the Bull Head Oil Company, at the suggestion of Kelsey, because the parties had been so bull-headed.

(12) That the capital stock of the Bull Head Oil Company was \$18,000.00, to be and actually was divided as follows: \$8,000.00 to Dunn and Gillam; \$8,000.00 to Mullen; \$1,000.00 to J. S. Dolman, attorney for Dunn and Gillam, and \$1,000.00 non-voting stock to J. W. Gladney, the lessee of the 5-acre Gladney lease.

(13) That the Thomas lease to Dunn and Gillam and the Eaves lease to Mullen, being on file in Kelsey's office, Kelsey directed his oil inspector to take both leases to Ardmore where all the parties resided, "*for the purpose of allowing one of them to be joined in by the other guardian,*" as said by Kelsey in his testimony (Rec., p. 173).

(14) That on account of the fact that the Eaves lease to Mullen described 130 acres and the Thomas lease to Dunn and Gillam only described the 40 acres in controversy between the parties, the parties deemed it expedient to have Eaves join in the Thomas lease to Dunn and Gillam, instead of having Thomas join in the Eaves lease to Mullen.

(15) That but for the fact that the Mullen lease from Eaves described 130 acres, it was wholly im-

material to the parties and to Kelsey, Indian Superintendent, whether Thomas joined in the Eaves lease to Mullen, or Eaves joined in the Thomas lease to Dunn and Gillam.

(16) That when the compromise agreement was agreed upon between the parties on January 9, 1914 (Rec., p. 135), Mullen, as disclosed by Kelsey's report to the Commissioner of Indian Affairs on January 31, 1914 (Rec., pp. 106-108), "requested the Department to disapprove his lease insofar as it covers the land described in the lease to Dunn and Gillam."

(17) That Kelsey thereupon on January 31, 1914, recommended to the Secretary of the Interior the disapproval of Mullen's lease from Eaves, as curator, insofar as it covers the 40 acres involved and recommended the approval of the Thomas lease to Dunn and Gillam, it appearing, as said by Kelsey in his report, that "at the conference subsequently held, a compromise was effected, wherein J. S. Mullen, lessee in the prior lease, requested the Department to disapprove his lease insofar as it covers the land described in the lease to Dunn and Gillam. J. J. Eaves, curator of Allie Daney, has entered into the execution of the lease in favor of Dunn and Gillam, to which the County Court of LeFlore County has given its approval."

(18) That on January 28, 1914, T. H. Dunn and J. Robert Gillam executed an assignment on the De-

partmental form conveying said lease to the Bull Head Oil Company, which was approved by the Secretary of the Interior on April 7, 1914. (See Exhibit B, Rec., pp. 24-5-6.)

(19) That neither Dunn nor Gillam was or claimed to be at any time the guardian or trustee of Allie Daney, the minor.

(20) That assuming Thomas was the legal guardian, there is no showing that the consideration paid for the lease was inadequate or that Allie Daney suffered any damages on account thereof.

(21) That while the Government's appeal from the judgment of the District Court dismissing its bill was pending in the United States Circuit Court of Appeals, the Bull Head Oil Company, assignee and owner of the lease involved, entered into a compromise with the United States, acting through the Secretary of the Interior and the Attorney General of the United States, whereby the Bull Head agreed to pay and did pay to the Indian Superintendent at Muskogee for Allie Daney's account the sum of \$45,000.00, and paid Mr. Ledbetter, assistant to the Attorney General, a fee of \$12,500.00 (see Rec., p. 256).

Conclusions of Law.

We insist on the following points of law:

(1) That A. N. Thomas, not being the legal guardian of the estate of Allie Daney, a minor, at the time he executed the Dunn and Gillam lease on

August 19, 1913, or at any time thereafter until September 30th, 1914, and after Eaves resigned as curator and permitted Thomas to be appointed as guardian, the Thomas lease to Dunn and Gillam was absolutely null and void.

(2) That the Departmental oil and gas lease executed by J. J. Eaves, curator of Allie Daney, to J. S. Mullen, on August 18, 1913, under the order and confirmation of the County Court of Love County (Rec., pp. 211-213) was a valid and binding oil and gas mining lease subject to the approval of the Secretary of the Interior—that is to say, it was as valid and binding as possible to make under the law, the Secretary's approval being necessary to its final confirmation.

(3) That Eaves, the legal guardian or curator of Allie Daney, having, on August 18, 1913, executed a lease to Mullen on this same land duly authorized and confirmed by the County Court of Love County, the court having jurisdiction, the execution of a lease on the same land to Dunn and Gillam on the same date or any other date thereafter by a pseudo or counterfeit guardian, no matter how fraudulently obtained, created no actionable wrong in favor of Allie Daney against the lessees (Dunn and Gillam) under such lease, in the absence of evidence *that she suffered some injury thereby.*

(4) That Dunn and Gillam, occupying *no fiduciary relationship* to Allie Daney, and having ob-

tained nothing from her by virtue of the Thomas lease, cannot be held to be trustees of any property or right or interest acquired by them in the Mullen lease from Eaves by virtue of having used the Thomas lease as a means of inducing Mullen to compromise whereby they obtained from Mullen, and not from Allie Daney, an interest in the lease.

(5) That the fact that Eaves joined in the Thomas lease instead of Thomas joining in the Eaves lease in no way alters the legal rights or status of the parties, it clearly appearing that the lease involved in this case never acquired any validity from its execution by Thomas, as guardian, and therefore, insofar as the rights of the parties are involved, we must treat the lease as having been executed solely by J. J. Eaves, curator of Allie Daney.

(6) That the signing and executing of the lease by J. J. Eaves, curator of Allie Daney, although the name of J. J. Eaves does not appear in the body of the lease, made it a valid lease from J. J. Eaves, curator of Allie Daney, a minor.

(7) That upon the discovery of the alleged fraud the United States had one of two remedies, to-wit: (a) An action in equity for rescission, cancellation and accounting, in which it would be necessary to offer to do equity by restoring to defendants the consideration paid, etc., or (b) an action for damages to recover the value of the lease at the time it was fraudulently obtained.

(8) That the plaintiff can not have both of these remedies and was required to elect which remedy it would pursue, and having elected to pursue the remedy in equity for rescission, it is bound thereby.

(9) That having elected to sue in equity for the rescission and cancellation of the lease, the compromise with the Bull Head Oil Company, the assignee and owner of the lease, condoned all fraud and extinguished the cause of action in its entirety, without regard to the doctrine of joint tort feasors and therefore left the Government with no cause of action for damages or other relief against Dunn or any of the other parties.

(10) That by the compromise of this case while pending in the Court of Appeals the appellant lost all equities in that it appears from the evidence that the compromise was a collusive arrangement between the Bull Head Oil Company and certain of its stockholders whereby certain stockholders, with the consent and approval of the appellant, received preferential advantages out of the funds and assets of the corporation in which appellees, Dunn and wife, also stockholders, were not allowed to participate.

(11) That if the compromise with the Bull Head Oil Company, the assignee and owner of the lease, did not enure to the benefit of Dunn and Gillam and their wives, as stockholders, the measure of any recovery against Dunn and Gillam is the value of the

lease at the time it was executed on August 18, 1913, and full value having been paid to the Indian Superintendent and received by the Indian, there is nothing to recover in this suit.

POINT ONE.

At all times from November, 1905, until September 12, 1914, J. J. Eaves was the duly appointed, qualified, legal and acting curator or guardian of the estate of Allie Daney, and as such was the only person empowered by law to execute an oil lease on the 40 acres of land in question.

The third paragraph of plaintiff's bill (Rec., p. 3) alleges that J. J. Eaves was appointed curator of the estate of Allie Daney by the United States Court for the Southern District of the Indian Territory on or about November 8, 1905, and "that after the admission of the State of Oklahoma into the Union said curatorship cause was transferred to the County Court of Love County, Oklahoma."

In the Government's pleadings and on the trial in the lower court the only assault made upon the validity of the Eaves lease to Mullen is set forth in the third paragraph of plaintiff's bill (Rec., p. 3), as follows:

"That said minor, Allie Daney, was born, reared and has resided practically all her life near Talihina, in that part of the central district of the Indian Territory, now embraced within

LeFlore County, Oklahoma, and that she never resided elsewhere prior to the year 1918.

That on or about November 8, 1905, the United States Court for the Southern District of the Indian Territory, sitting in probate, appointed J. J. Eaves as curator of the estate of said Allie Daney, and that after the admission of the State of Oklahoma into the Union said curatorship cause was transferred to the County Court of Love County, Oklahoma.

Plaintiff alleges that *because said minor was never a resident of the Southern District of the Indian Territory, the order appointing said J. J. Eaves curator was invalid for want of jurisdiction*; should this court not so hold, plaintiff alleges that all *authority of said J. J. Eaves as curator was terminated upon the admission of Oklahoma into the Union, because the laws simultaneously put into force in Oklahoma, and particularly laws then in force and enacted in 1908 relative to minor Indians, did away with the office of curator and created in place thereof the office of guardian.*"

The above allegations constitute a plea of "confession and avoidance."

The Government's case, as made in its bill and as tried in the lower court, is this:

(1st) That Eaves' appointment as curator by the United States Court for the Southern District of the Indian Territory was void for want of jurisdiction "because said minor was never a resident of the Southern District of the Indian Territory;" and,

(2nd) That if the United States Court for the Southern District of the Indian Territory had jurisdiction, "all authority of J. J. Eaves as curator was terminated upon the admission of Oklahoma into the Union, because the laws simultaneously put into force in Oklahoma, and particularly laws then in force and enacted in 1908 relative to minor Indians, did away with the office of curator and created in place thereof the office of guardian."

If the Government has abandoned these points it has abandoned its case.

First Question:

The first question presented by the bill is the allegation that Allie Daney was never a resident of the Southern District of the Indian Territory, and therefore the order appointing Eaves curator was invalid for want of jurisdiction.

Answer One:

The records show that the land involved was in the Southern District of the Indian Territory. The land lies in Carter County, Oklahoma, and the Southern Court District of the Indian Territory comprised all of Carter County and a large part of the contiguous territory. That being true, the United States Court for the Southern District of the Indian Territory had jurisdiction to appoint a curator for Allie Daney.

—*MaHarry v. Eatman*, 29 Okl. 46.

Answer Two:

The record shows that Allie Daney's father, Solomon Daney, was living at all times mentioned, and it is well settled that the domicile of an infant is that of the parent from whom she took her domicile of origin, and changes only with the domicile of that parent. Her father (Rec., p. 228) filed his written waiver of right to be appointed guardian in the United States Court and asked the court to appoint Eaves guardian or curator. Solomon Daney, the father, also, on September 30, 1914 (Rec., p. 227), filed a petition in the County Court of LeFlore County asking the appointment of A. N. Thomas as guardian. She had a living father at all times mentioned.

Now, there is neither allegation nor proof that the father of Allie Daney was not domiciled in the Southern District of the Indian Territory. That the domicile of the child is controlled by that of the parent, see the following cases:

Ex parte Patterson, 166 Fed. 536;
Marks v. Marks, 75 Fed. 321;
Taylor v. Jeter, 81 Am. Dec. 202;
Hiestand v. Kuns, 46 Am. Dec. 481;
Lacy v. Williams, 27 Mo. 280;
Somerville v. Somerville, 5 Ves. Jr. 750, 1
A. R. C. 284;
Wheeler v. Hollis, 19 Tex. 522, 1 A. R. C.
359-364, and a long list of cases;
Tiffany, Persons and D. Relations, p. 292;
Rogers on Domestic Rel., Sec. 656.

These authorities lay down the rule that an infant cannot change his domicile; that upon the death of the father, the domicile follows that of the mother. Notwithstanding the separation of the husband and wife, the domicile of the father controls the domicile of the minor; the father's domicile controls the domicile of the minor, and that question is thoroughly settled by the authorities. See 1 A. R. C. 364, etc., for a long list of cases and annotations.

—*Powers v. Mortee*, Fed. Cases 11362, and a long list of authorities;
1 A. R. C. 364.

The jurisdiction, or rather *venue*, of the court to appoint a guardian of a minor is controlled by the domicile of the minor, *and not* by the residence of the minor.

—*Jenkins v. Clark*, 71 Ia. 552, 32 N. W. 504.

Woerner on Guardianship, page 80, on this question, says:

“The residence of infants conferring the jurisdiction in the sense of these statutes means domicile, or home, as distinguished from residence, which may be temporary, or for a special purpose. The domicile of an infant is that of his father, if legitimate, or of his mother, if illegitimate, or after the father's death, or of a grand-parent or other person standing *in loco parentis*. The placing of a child by its father in the custody of a person residing in another county does not affect the child's domicile, nor the mother's right to its custody and care after

the father's death; so that after her death the jurisdiction to appoint a guardian is in the county in which she was domiciled at the time, although she had been adjudged insane before the father's death, and never declared restored. This domicile remains until the infant legally acquires another; and since the law conclusively disables infants from acting for themselves during minority, their domicile cannot be altered by their own acts before reaching majority. Hence the legal domicile of infant orphans is at the place where the father was domiciled at the time of his death, unless they have acquired a new domicile by remaining a member of the family of the mother when the mother acquires a domicile different from that of the children's father, or gain a new domicile in some way recognized as sufficient by the law. *It is the probate court of the county in which this domicile is situated that has alone the power to appoint the guardian.*"

Answer Three:

The United States Court for the Southern District of Indian Territory was a court of general jurisdiction with respect to the appointment of guardians and administrators of estates, etc., and its orders and decrees are not subject to collateral attack. The court had jurisdiction to determine the venue, frequently confused in judicial opinions with the word "jurisdiction." There is a distinction between jurisdiction of the subject-matter—the abstract subject-matter—and territorial jurisdiction. Territorial

jurisdiction means venue, sometimes denominated in decisions as *quasi-jurisdictional* questions. Now, every court has jurisdiction to determine its own venue; otherwise it could never proceed and its judgments would be always open to collateral attack. Every court has jurisdiction to determine its venue, and the United States Court for the Southern District had jurisdiction to determine the domicile of Allie Daney, and having passed on that question and appointed a guardian or curator, the decision of the court finding that it had venue is conclusive and binding on all the world, whether right or wrong. As said by Judge SANBORN, in *Foltz v. St. Louis & S. F. Ry. Co.*, 60 Fed. 319:

“Wherever the right and the duty of the court to exercise its jurisdiction depends upon the decision of a question it is invested with power to hear and determine, there its judgment, right or wrong, is impregnable to collateral attack, unless impeached for fraud.”

The United States Court for the Southern District had jurisdiction over the subject-matter (*Eaves v. Mullen*, 25 Okl. 679). Whether Allie Daney was domiciled or not within the Southern District, cannot be raised in this case.

—*Hathaway v. Hoffman*, 53 Okl. 72;

Baker v. Cureton, 49 Okl. 15;

Scott v. Abraham, 60 Okl. 10, 159 Pac. 270;

Johnson v. Johnson, 60 Okl. 206, 159 Pac. 1121;

Tucker v. Leonard, 76 Okl. 16, 183 Pac. 907; *Lowery v. Parton*, 65 Okl. 232, 165 Pac. 164; *Wakeman v. Peter*, 52 Okl. 639; *Rice v. Theimer*, 45 Okl. 618; *Estate of Latour*, (Calif.) 73 Pac. 1070; *Dungan v. Superior Court*, 117 Am. St. Rep. 119; *Welch v. Focht*, ... Okl. . . ., L. R. A. 1918 D, 1163; *Guardianship of Danneker*, (Calif.) 8 Pac. 514.

Scott v. Abraham, *supra*; *Hathaway v. Hoffman*, *supra*, and *Baker v. Cureton*, *supra*, are exactly in point.

The United States Court for the Southern District of Indian Territory was a court of general jurisdiction in the sense that its records import verity. A court of record which has, by statute, all the power that any court could have over a certain subject of jurisdiction, is to be regarded as to cases within that class, a court of superior jurisdiction within the rule which presumes the jurisdiction of such courts to render a particular judgment.

—*Stahl v. Mitchell*, 41 Minn. 325, 43 N. W. 385.

The Circuit, District and Territorial Courts of the United States, though of limited jurisdiction, are not inferior courts in the technical sense of the term, and their judgments and decrees stand on the same footing as those rendered by state courts of

equal jurisdiction, and their authority or jurisdiction will always be presumed.

—*McCormick v. Sullivant*, 10 Wheat. 192, 6 L. ed. 300;

Ex parte Watkins, 3d Peters 193, 7 L. ed. 650;

Kennedy v. Georgia St. Bk., 8 How. 611, 12 L. ed. 1209;

Page v. United States, 11 Wall. 268, 20 L. ed. 135;

Evers v. Watson, 156 U. S. 527, 39 L. ed. 520;

Skirving v. National Life Ins. Co., 59 Fed. 742;

Livingston v. Van Ingen, 1 Paine 48, Fed. Cas. No. 8420;

McConnell v. Day, 61 Ark. 464, 33 S. W. 731;

Reed v. Vaughan, 15 Mo. 135, 55 Am. Dec. 133;

Turrell v. Warren, 25 Minn. 9.

It has never been denied that the United States Courts in the Indian Territory had jurisdiction to appoint guardians or curators for tribal minors. Section 31 of the Act of Congress approved May 2, 1900 (26 Stat. L. 81), put in force in the Indian Territory chapter 73 of Mansfield's Digest of the Statutes of Arkansas, in regard to guardians, curators and wards, and declared, in regard to the United States Court in the Indian Territory, that "said

court in the Indian Territory shall appoint guardians and *curators*."

Then, to remove any possible doubt about the question, Congress, by an act approved April 28, 1904 (33 Stat. L. 573), declared that "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the District Courts in said Territory in the settlements of all estates of decedents, *the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise.*"

See *MaHarry v. Eatman*, 29 Okl. 46.

Plaintiff's Next Contention:

Plaintiff's next contention is that upon admission of Oklahoma as a state, the office of curator ceased to exist, because under the Oklahoma laws and constitution, there is no provision for curator. There is nothing in that contention. Sections 3477, 3478 and 3485 of Mansfield's Digest of the laws of Arkansas authorize the court to appoint a curator for the property and estate of the minor. Chapter 73 of Mansfield's Digest authorized the probate court to appoint "a guardian or curator of the person or estate of any minor;" the probate court could appoint one party guardian of the person and prop-

erty of the minor, or could appoint a guardian of the person and a curator of the estate. It is contended that there is no such office in Oklahoma as curator, but that is a highly refined *play* on words which *means* nothing. Curator is simply another word for guardian of the estate.

Thus, Woerner on Guardianship, page 48, says:

“The term curator is, in America, said to have been borrowed from the civil law, and sometimes used to designate the person having charge of the infant’s estate, in contradistinction to a guardian, who has charge of the person, or of both the person and estate.”

Curator, as used in the Arkansas statute, simply means a guardian of the estate, while the word guardian may mean guardian of the person and estate, or simply guardian of the person. The Oklahoma statutes expressly authorize the appointment of a guardian for the person or a guardian for the estate, and there is no doubt under the Oklahoma statutes that the County Court may appoint one party a guardian of the person and another party guardian of the estate.

Chapter 33 of the Revised Laws of Oklahoma for 1910, beginning with section 3321, defines guardianships and classifies them. Section 3321 says:

“A guardian is a person appointed to take care of the person or property of another.”

The next section says that:

“The person over whom, or over whose property, a guardian is appointed, is called the ward.”

This chapter goes on to classify guardians as general and special and says that a general guardian is guardian of the person “Or of all the property of the ward within this state, or of both.” Section 3334 says:

“A guardian of the person is charged with the custody of the ward, and must look to his support, health and education. He may fix the residence of the ward at any place within the state, but not elsewhere, without permission of the court.”

Section 3335 says:

“A guardian of the property must keep safely the property of his ward. He must not permit any unnecessary waste or destruction of the real property, *nor make any sale of such property without the order of the County Court, but must, so far as it is in his power, maintain the same, with its buildings and appurtenances, out of the income or other property of the estate, and deliver it to the ward at the close of his guardianship, in as good condition as he received it.*”

Now, these two sections, as well as the others, expressly authorize the court to appoint a guardian of the person as separate and distinct from the guardian of the estate, and the Iowa Supreme Court, in *Lawrence v. Thomas*, 51 N. W. 11, held, under stat-

utes not nearly so plain as ours, that the probate court could appoint one party guardian of the person and another party guardian of the estate. Therefore, the County Courts of Oklahoma have the authority to do exactly the same thing the United States Court for the Southern District of Indian Territory had jurisdiction to do, to-wit, appoint a guardian of the person, as distinct from a guardian of the estate, the only difference being that under the laws of Oklahoma, the guardian of the estate is denominated *guardian*, whereas under the Arkansas law the guardian of the estate was denominated *curator*.

Thus, in *Duncan v. Crook*, 49 Mo. 116, the court, in holding that a guardian of the person could not apply for an order of the court to sell the ward's estate, that authority being in the curator, said:

“We have adopted the term ‘*curator*’ from the civil law, and it is applied to the *guardian of the estate of the ward*, as distinguished from the *guardian of his person*.”

In *Larned v. Renshaw*, 37 Mo. 459, the court in holding a minor might join in partition proceedings by his curator, said:

“The distinction here taken between guardian and curator, we think, is more artificial than real, when applied to the question involved in this case.”

The opinion goes on to trace the origin of curatorship and guardianship, and this court will probably

want to read it, and we will therefore not quote extensively from it.

In *Senseman's Appeal*, 21 Pa. St. 333, the court said:

“The authority of a guardian bears a near resemblance to that of a father, and is plainly derived out of it, the guardian being only a temporary parent. He usually performs the office of both tutor and curator of the Roman law; the former of which had charge of the maintenance and education of the minor, and the latter the care of his fortune.”

2 Words and Phrases, page 1785, says:

“The word ‘curator’ when applied to the care of an estate, merely, means the same as ‘guardian’; and the fact that an order of appointment designates the appointee as curator of an insane person instead of guardian, in the word of 2 Rev. St. 1879, Sec. 5791, providing for the appointment of a ‘guardian’ for the person and estate of an insane person is immaterial.”

—*Earley v. Bone*, 39 Mo. App. 388, 391.

Section 1 of the schedule to the Oklahoma constitution preserved this curatorship, and on admission of the state, the Eaves curatorship or guardianship case went into the County Court of Love County, having been pending in the United States Court for the Southern District, at Marietta, when Oklahoma was admitted. The County Court of Love County therefore had jurisdiction under sections 12 and 13 of article 7 of the Oklahoma constitution.

POINT TWO.

Two separate and distinct guardianships or curatorships cannot exist at the same time for one and the same person.

Woerner on Guardianship, page 112, says:

"So long as the appointment of a guardian to a minor, by a court in the rightful exercise of its jurisdiction, remains unrevoked, no one else can be appointed or recognized as the lawful guardian of such minor."

See, *In re Guardianship of Danneker*, 8 Pac. 514.

Conceding, for the sake of argument, that Atha Thomas was *guardian of the person of Allie Daney*, by virtue of his appointment in 1911, in LeFlore County, yet he could not execute an oil lease.

—*Duncan v. Crook*, 49 Mo. 116;

Sec. 3335, R. L. Okla. 1910.

Section 3 of the Original Creek Agreement (31 St. L. 861) refers to guardians or curators, and so do sections 2 and 6 of the Act of Congress of May 27, 1908 (35 Stat. L. 312). In regard to leases for mineral purposes on the lands of minor allottees, section 2 of the Act of May 27, 1908, says that such lands may be leased "by the allottee, if an adult, or by guardian or *curator* under order of the proper probate court if a minor," etc., such leases, however, to be approved by the Secretary of the Interior. Section 6 of the Act of May 27, 1908, authorizes the Sec-

retary of the Interior to appoint local representatives to investigate the conduct of guardians or *curators* having in charge the estates of such minors, and,

“Whenever such representatives * * * shall be of opinion that the estate of any minor is not being properly cared for by guardian or *curator*, or that the same is in any manner being dissipated or wasted * * * by the guardian or *curator*, such representatives * * * shall have power and it shall be their duty to report said matter in full to the proper probate court.”

The very Act of Congress, Act of May 27, 1908 (35 Stat. L. 312), under which this lease was executed, expressly recognizes a guardian of the property, or curator, and this lease had to be made by the curator. The execution of the lease by Thomas was of no validity.

The narrative statement of the record, as agreed to by counsel for the government and the defendants over their signatures (Rec., p. 240) contains a recitation (Rec., p. 234) “that upon the admission of Oklahoma as a state on November 16, 1907, all guardianships, curatorships, administrations, and probate proceedings pending in the United States Court for the Southern District of the Indian Territory, at Marietta, Indian Territory, passed into the County Court of Love County, Oklahoma, said County Court of Love County, Oklahoma, being the successor to the United States Court for the Southern District of the Indian Territory in all probate proceedings pending

at Marietta, in said court," and "that on the 26th day of January, 1914, the County Court of Love County, Oklahoma, on the petition of J. J. Eaves, as curator of Allie Daney, entered the following order directing Eaves, as curator, to join in the oil and gas lease executed by A. N. Thomas, as guardian of Allie Daney, to T. H. Dunn and J. Robert Gillam", said order being set out in full. *That agreement is a correct statement of the law and facts.*

—*Scott v. McGirth*, 41 Okl. 520;
Eaves v. Mullen, 25 Okl. 679;
Burdett v. Burdett, 26 Okl. 416.

The County Court of Love County never lost jurisdiction of the Eaves curatorship until it entered its order on March 31, 1914 (Rec., p. 237), transferring the case to the County Court of Carter County.

—*Crosbie v. Brewer*, 68 Okl. 16, 158 Pac. 388;
In re Guardianship of Chambers, 46 Okl. 139;
In re Henning's Estate, 128 Cal. 214, 60 Pac. 762;
In re Brady, (Id.) 79 Pac. 75;
Wackerle v. People, ex rel., 168 Ill. 250, 48 N. E. 123;
Armour Packing Co. v. Howe, 68 Kans. 663, 75 Pac. 1014;
Dorman, Gdn., v. Ogbourne, 16 Ala. 759;
Seiberling & Co. v. Newton, 43 N. E. 151;

Sanford v. Sanford, 28 Conn. 6;
11 Cyc., page 690;
15 C. J., page 822.

Eaves was not only *de jure* curator but *de facto* curator because he actually occupied the office and exercised the authorities of a curator. There is no such thing as a *de facto* guardian or curator during the actual occupancy of the office by a *de jure* guardian. In a restricted sense the term "*de jure* officer" designates one who has the lawful right to an office but is not the actual incumbent thereof, either because he has never been in possession or has been ousted therefrom. But, in a more comprehensive sense, an "*officer de jure*", if actually occupying the office, excludes the possibility of a *de facto* officer. If the *de jure* officer is in possession of the office there can be no such thing as a *de facto* officer or *de facto* curator.

—Constantineau on the *De Facto* Doctrine,
Sec. 21.

The record shows, beginning on page 228, that upon the petition of Solomon Daney, father of Allie Daney, the United States Court for the Southern District of the Indian Territory, sitting at Pauls Valley, appointed Eaves curator of Allie Daney on November 8, 1905; that Eaves executed and filed his bond (Rec., p. 229) on the same date, which was approved by the court; that on February 5, 1906, the said United States Court (Rec., p. 230) transferred

the Eaves curatorship from Pauls Valley to the United States Court at Marietta; that on February 5th, 1906 (Rec., p. 232), Eaves filed a report showing that he had selected at the Chickasaw land office an allotment for Allie Daney, describing it; that on April 18, 1906 (Rec., p. 233), Eaves filed an inventory setting forth a complete description of the land selected by him as an allotment for Allie Daney; that on the 5th day of March, 1907 (Rec., p. 233), the United States Court made an order substituting the Southern Trust Company as bondsman; that on October 11, 1913 (Rec., p. 236), Eaves filed a report in the Love County Court showing that he had leased part of the land of Allie Daney during the years 1905, '06, '07, '08, '09, '10, '11, '12 and 1913; that on March 31, 1914 (Rec., p. 237), the Love County Court entered an order transferring the Eaves curatorship to the County Court of Carter County; that on June 18, 1914 (Rec., p. 237), Eaves filed his report in the County Court of Carter County and prayed for permission to resign as curator; that on September 12, 1914 (Rec., p. 239), the Carter County Court entered an order accepting Eaves' resignation as curator and approving his final report; that on September 22, 1914 (Rec., p. 239), the County Court of Carter County entered an order transferring the Eaves curatorship to the County Court of LeFlore County, sitting at Talihina, Oklahoma, *and that is the way the case got into the County Court of Le-*

Flore County, and not until Eaves had resigned and the curatorship had been transferred to the County Court of LeFlore County, did A. N. Thomas at any time become the legal guardian of Allie Daney. After the County Court of Carter County had transferred the Eaves curatorship to the County Court of LeFlore County by its order of September 22, 1914, then and not until then did the LeFlore County Court obtain jurisdiction.

On September 24, 1914 (Rec., p. 227), Solomon Daney, father of Allie Daney, filed a verified petition in the County Court of LeFlore County asking for the appointment of a guardian for Allie Daney and nominating therein A. N. Thomas. "After due notice and on the hearing, the court made and entered the following order, and thereupon Atha N. Thomas executed a bond as required by law and the order of court with good and sufficient sureties, etc., and on the order of the court letters of guardianship were issued to Atha N. Thomas." Then follows (Rec., p. 227) a copy of the order appointing Thomas guardian, made and entered by the LeFlore County Court on the 30th day of September, 1914, more than a year after he had executed the lease involved in this case to Dunn and Gillam on August 18, 1913, and several months after the Secretary of the Interior had approved it after Eaves, curator, had also executed it.

POINT THREE.

This brings us to a discussion of the 2nd, 3rd, 4th and 5th conclusions of law heretofore asserted, to-wit:

(2) That the Departmental oil and gas lease executed by J. J. Eaves, curator of Allie Daney, to J. S. Mullen, on August 18, 1913, under the order and confirmation of the County Court of Love County (Rec., pp. 211-213) was a valid and binding oil and gas mining lease subject to the approval of the Secretary of the Interior—that is to say, it was as valid and binding as possible to make under the law, the Secretary's approval being necessary to its final confirmation.

(3) That Eaves, the legal guardian or curator of Allie Daney, having, on August 18, 1913, executed a lease to Mullen on this same land, duly authorized and confirmed by the County Court of Love County, the court having jurisdiction, the execution of a lease on the same land to Dunn and Gillam on the same date or any date thereafter by a pseudo or counterfeit guardian, no matter how fraudulently obtained, created no actionable wrong in favor of Allie Daney against the lessees (Dunn and Gillam) under such lease, in the absence of evidence that she suffered some injury thereby.

(4) That Dunn and Gillam, occupying *no fiduciary relationship* to Allie Daney, and having obtained nothing from her by virtue of the Thomas

lease, cannot be held to be trustees of any property or rights or interest acquired by them in the Mullen lease from Eaves by virtue of having used the Thomas lease as a means of coercing Mullen into a compromise agreement whereby they obtained from Mullen, and not from Allie Daney, an interest in the lease.

(5) That the fact that Eaves joined in the Thomas lease instead of Thomas joining in the Eaves lease in no way alters the legal rights or status of the parties, it clearly appearing that the lease involved in this case never acquired any validity from its execution by Thomas, as guardian, and therefore, insofar as the rights of the parties are involved, we should treat the lease as having been executed solely by J. J. Eaves, curator of Allie Daney.

CRUX OF THE CASE.

Mullen's lease from Eaves, curator, executed August 18, 1913 (Rec., p. 214), covered 130 acres and when approved by the County Court of Love County vested in Mullen a property right to submit the lease to the Secretary for his approval or veto. Although the Secretary's approval was a necessary element to render the lease finally valid and binding, nevertheless Mullen had the right to submit it for approval—a valuable right, which was at least in a qualified sense a property right.

The Eighth Circuit Court of Appeals, in *Anicker v. Gunsburg*, 226 Fed. 176, cited by appellant's

counsel, refers to an unapproved Departmental oil lease as an "inchoate lease prior to approval by the Secretary of the Interior," and in another part of the opinion refers to the "inchoate rights created by an oil and gas lease, signed by an Indian, but not approved by the Secretary of the Interior." The Thomas lease created no inchoate rights because he had no authority to act as guardian or curator, but Eaves lease to Mullen did.

Dunn and Gillam obtained their interest in the oil and gas leasehold rights in this 40 acres of land by virtue of a lease executed by J. J. Eaves, curator; they got their interest in the leasehold rights through Mullen, who had a valid lease executed by Eaves as curator and confirmed by the County Court of Love County on August 19th, 1913, which lease was subsequently surrendered by Mullen for a new and substituted lease executed by the same curator on this 40 acres. That is to say, the Mullen curator lease of August 19th, 1913, was surrendered by Mullen as to this 40 acres in consideration of a new lease from the same curator on this 40 acres, Mullen being compelled to surrender to Dunn and Gillam an interest in the lease in order to get his lease approved by the Secretary of the Interior. *Dunn and Gillam had no interest in the leasehold rights and never acquired any through the Thomas lease and the fact that they used the Thomas lease as a means of coercing Mullen into giving them an interest in a*

valid lease did not operate to take anything away from Allie Daney, but operated to take an interest away from Mullen, the lessee. If this is true, how can Dunn and Gillam be treated as trustees for Allie Daney, when they acquired nothing from her but acquired the interest from a third party?—an innocent third party—against whom there is no evidence of fraud. Mullen is found by the trial court, and admitted on this appeal by the Government, to have been an innocent party all along the line.

To appreciate this situation this court must put itself in the atmosphere of the facts.

FINDINGS OF FACT BY TRIAL JUDGE.

There is no contention that the following findings of fact by the trial judge are erroneous, *to-wit*:

“That on the 8th day of November, 1905, J. J. Eaves, prior to the erection of the State of Oklahoma, was appointed curator of the estate of the said Allie Daney by the United States Court for the Southern District of the Indian Territory sitting in probate, and the said land, *to-wit*:

The South Half of the Northwest Quarter of the Southwest Quarter, and the West Half of the Southwest Quarter of the Southwest Quarter of Section Four (4), Township Four (4) South, Range Three (3) West,

being then and there located in the Southern District of the Indian Territory and having been prior to that time allotted to the said Allie

Daney and said Allie Dancy then and there being the owner of said land.

That after the erection of the State of Oklahoma, said curatorship or proceedings thereof was duly transferred to Love County, Oklahoma, and that the said J. J. Eaves, as such curator, on the *18th day of August, 1913*, executed an oil and gas lease to J. S. Mullen covering said lands, and that J. S. Mullen presented the said oil and gas lease to Dana H. Kelsey, acting in the capacity of Superintendent to the Five Civilized Tribes, for approval.

• • • • •
“I further find that said lease from said Thomas to Dunn and Gillam was also filed with the said Dana H. Kelsey, acting in the capacity as Superintendent of the Five Civilized Tribes, for approval, but that he declined to approve either one of them as long as there was a controversy as to which was the *de jure* guardian of the estate of Allie Daney.

I further find that the said Dana H. Kelsey, acting as Superintendent to the Five Civilized Tribes, suggested to the holders of the respective leases that they organize a corporation and call it the Bull Head Oil Company, the holders of the respective leases each to have one-half of the stock of said company, and that the said J. J. Eaves, as curator of said estate, to join in the said lease executed *or to be executed by the said A. N. Thomas*, and that after the lease was appraised and its bonus value ascertained and paid, that then he would approve the lease so executed and assigned to the said Bull Head Oil Company for whatever bonus was determined by such appraisement to be paid.

I find that this plan was carried out by the parties with the addition of five acres known as the Gladney tract, which was added to the Bull Head Oil Company's Allie Daney holding, and its value was included in the capital stock of the company in the value of \$2,000 and the Allie Daney lease at \$16,000, making the total capital stock of \$18,000.

The holders of the original lease from J. J. Eaves, as curator, otherwise known as the Mullen's interest, were to and did receive eight thousand dollars of the capital stock of the Bull Head Oil Company.

The holders of the original A. N. Thomas lease, otherwise referred to as the Dunn and Gillam interest, were to and did receive eight thousand dollars of the capital stock of said oil company, L. S. Dolman and Gladney to receive one thousand dollars each of the original stock of the company—Gladney having furnished a lease on five acres not within the Allie Daney holdings—the Gladney stock not to participate in the voting of the corporation. The stock of the Mullen interest was issued to J. S. Mullen, Errett Dunlap and L. S. Dolman, and the stock representing the Dunn and Gillam interest was issued to T. H. Dunn, as trustee.

• • • • • • •
“I find that at the time the lease was executed by J. J. Eaves as curator of the Allie Daney estate he was then and there the regular guardian of her estate, and that when he joined in the A. N. Thomas lease, having first been specifically authorized to that end by the County or Probate Court of Love County, he was then and there the regular guardian of her estate and

that when he acted in joining in the lease by executing it, Mr. Dana H. Kelsey, the Superintendent of the Five Civilized Tribes and representative of the Secretary of the Interior as to the initiation of such matters, that the same was done at his suggestion and that when J. J. Eaves as curator acted in joining in the execution of said lease and same was approved by the County or Probate Court of Love County, that this was done at the suggestion of said Dana H. Kelsey, Superintendent of the Five Civilized Tribes, and representative of the Secretary of the Interior; that by the act of the said J. J. Eaves as curator, and the authorization and approval of the County or Probate Court of Love County, placed the oil and gas legal title in Dunn and Gillam *to be transferred to the Bull Head Oil Company subject to the approval of the lease by the Secretary of the Interior, and afterwards the bonus fixed by the Secretary of the Interior through the Superintendent of the Five Civilized Tribes, to-wit: two thousand dollars was paid and said lease approved by the Secretary of the Interior.*

I hold that this had the effect of putting the oil and gas legal title in the Bull Head Oil Company free from the legal effect of fraud in the execution of the lease by A. N. Thomas as guardian, for he was not the *de jure* guardian of the estate of Allie Daney. J. J. Eaves was the legal guardian of her estate. A. N. Thomas may have been under his appointment the guardian of her person but it is not necessary to pass on that question.

Whilst I find from a fair preponderance of the evidence that there was legal fraud in the

execution of the original lease by A. N. Thomas, as guardian, to Dunn and Gillam, by the placing of an interest in J. J. Thomas' name for the personal and private benefit of A. N. Thomas, yet as I have stated, I find that J. J. Eaves was the legal guardian of her estate and that the lease executed by him was the valid lease and when he joined in this A. N. Thomas lease, that carried the oil and gas legal title when it had been authorized by the County or Probate Court of Love County and afterwards approved by that court and afterwards approved by the Secretary of the Interior who approved the lease so joined in by him, and that had the effect of placing the oil and gas legal title in the Bull Head Oil Company *free from fraud.*" (Rec., p. 69.)

MULLEN'S POSITION.

The undisputed evidence and the findings of the trial court show that Mullen was the victim of these untoward circumstances, to-wit: Although he had a valid guardianship lease from Eaves, approved by the County Court of Love County on August 19th, 1913, subject to the Secretary's approval, he was confronted with one of two alternatives, to-wit: he must either give up half to Dunn and Gillam or suffer his lease to be disapproved by the Secretary of the Interior.

This point is pretty well recognized in the Government's bill, paragraph 11 (Rec., p. 10) wherein it is alleged:

“That on the same day, August 19, 1913, that the A. N. Thomas lease described in paragraph No. V was executed, an oil and gas lease was executed by J. J. Eaves of Ardmore, Oklahoma, representing himself to be curator of the estate of said Allie Daney, same being in favor of J. S. Mullen and *covering among others*, the lands described in paragraph No. 1 hereof; said lease was filed for approval with the United States Indian Superintendent at Muskogee, Oklahoma, August 23, 1913, resulting in a contest before said Superintendent between J. S. Mullen, on the one side, and T. H. Dunn and J. Robert Gillam on the other, as to which of said leases should be approved. That after the organization of said corporation and about January 30, 1914, the respective lessees effected a compromise agreement touching said contest, as a result of which J. S. Mullen withdrew his application for the approval of the lease of J. J. Eaves, curator, to himself so far as concerned the lands described in paragraph No. 1, and induced the said Eaves to attach his signature as curator to the lease described in paragraph No. V, and said Mullen subsequently abandoned entirely the lease of J. J. Eaves, curator, to himself, and requested that same be disapproved by the Secretary of the Interior, which was accordingly done. That no consideration was paid or agreed to be paid to said J. J. Eaves, as curator, for his joining in the execution of said partnership lease of A. N. Thomas, in paragraph No. V described, and that his signature as such curator to said lease was wholly without effect, illegal and void; but that notwithstanding the void character of such act on the part of said J. J. Eaves, same was made

the basis of an agreement on the part of the Bull Head Oil Company, and on the part of T. H. Dunn and J. Robert Gillam, who controlled said corporation, on the one hand, and J. S. Mullen, on the other, whereby 8,000 shares, of the par value of one dollar per share, of the capital stock of said corporation was to be issued to said J. S. Mullen and associates, among whom were Jake L. Hamon, F. M. Adams and Errett Dunlap."

Honorable Dana H. Kelsey, United States Indian Superintendent, throws a flood of light on this whole situation. Mr. Kelsey (Rec., pp. 170-174) explains in detail the whole situation, as follows:

Q. "Tell how you regarded the situation presented to the Interior Department by the filing of these two leases, the one by Dunn and Gillam and the other to Mullen, executed by Thomas claiming to be the guardian of the minor and by Eaves claiming to be the curator of the minor?"

A. When these two conflicting leases were brought to my attention as Superintendent the same as any other conflicting ones, the first procedure was to notify both parties, as the copies will show in this case, of the filing of the conflicting instruments, to give them an opportunity to show cause why their lease should be approved. When the facts were secured showing that in this particular case there was only one question for consideration, namely, which was the legally appointed guardian entitled to act for this minor Indian, I notified the counsel, and probably the principals also, that it occurred to me that no action of the Department in approving

one of these contracts, would settle the question of the legality of the guardianship.

Q. Was that the view you took of the situation presented by the filing of these two conflicting leases at that time?

A. Exactly.

Q. Now, Mr. Kelsey, entertaining the view you have indicated by your answers, above, tell what, if anything, you did with that situation before you?

A. Following the procedure of the Interior Department we could have recommended the approval of one of the leases presented, and the disapproval of the other one, but knowing, as I did, the complications with reference to the guardianship I thought that this would not settle the matter, and that in all probability the controversy would get into the courts, and development might be stopped in the meantime, and after carefully considering the matter and securing the report as to the situation in the field, and ascertaining that this was a small tract of land lying almost in the heart of the Healdton oil producing area where active developments were going on, I first notified the counsel for the contending parties that in my judgment this was a case that should be adjusted, and if possible both guardians join in one instrument which then could be approved and without question convey a legal oil and gas mining lease. Later one of the principals, I think *Mr. Mullen, called on me and I told him that the matter had dragged along about long enough, that there seemed to be no way of determining this matter without disapproving both contracts*; that development had proceeded to such an extent that

the land would soon be drained, and that I thought there certainly was a middle ground somewhere where the two parties could get together, have the guardians both join in one lease *or* the other, and allow operations to proceed, then let the guardians fight among themselves as to which was the proper person to receive the royalty; *that if something along this line was not done very shortly I would recommend the disapproval of both leases*, and do whatever I could to see that the two guardians adjusted their troubles among themselves, or both of them sell the lease over again to allow operation to proceed. Mr. Mullen at that time said that there was such bitter feeling between the two parties and that he doubted they could get together. I think, as the record will show, shortly thereafter I notified by mail the opposing parties that something must be done soon, and that I believed a conference of all the parties together would result in good. I later had this conference at Ardmore in company with the local representative of the Department there. I visited the Healdton field, saw the situation on the ground, saw that the property soon would be drained, and in reality issued an ultimatum to both Dunn and Gillam and J. S. Mullen that unless they did get together on some basis within a very few days, I would recommend both leases for disapproval.

Q. Did you indicate to Mullen and Dunn and Gillam how they could settle the controversy between them; that is the procedure, or method by which they could unite their interests?

A. They, of course, asked me that when we finally got them so they would talk to each other, *and*

I said it didn't make any difference to me whether the Dunn-Gillam lease or the Mullen lease was approved; that if the LeFlore County lease was the one to be approved, the Love County curator should join. If the Love County lease should be approved, that the LeFlore County guardian should join. If one would withdraw or agree to assign an interest to each other it was a matter absolutely immaterial to me. I was doing what I thought was the duty of an executive officer to protect the interests of the minor.

Q. Did you make any statement to Dunn and Gillam on the one hand, and Mullen on the other, that if they would have both guardians join in one or the other of the leases, and the lessee make an assignment to the other contesting lessee, that you would make any recommendations in regard to the approval of that assignment to the Secretary of the Interior?

A. I did. I said if they did not care to entirely withdraw, one side or the other, that I would recommend an assignment of such part interest as they might agree among themselves upon.

In other words I suggested to them that if Eaves joined in the Dunn and Gillam lease I would recommend the Secretary to approve an assignment of an interest in that lease from Dunn and Gillam over to Mullen, *or vice versa*; I am not sure whether or not the parties advised me before I left Ardmore that they had come to an agreement among themselves, or whether they wrote me or wired me thereafter — 'I know it was very soon after the conference;' I don't think there was any agreement between these parties at Ardmore 'as to which

lease would be finally submitted for approval and which would be withdrawn; I think they advised me 'that they would have both guardians join in one lease, and I sent my *Oil Inspector to Ardmore with the original papers and instructed him to investigate the property and make a report to me as to what, if any, increase of the bonus should be assessed up against the lease that we would finally recommend for approval. He was to take these leases to Ardmore for the purpose of allowing one of them to be joined in by the other guardian; my Inspector took the Eaves lease and the Thomas lease both to Ardmore with him 'so that one or the other of them could be executed by the other guardian;'* the lease executed by Thomas, guardian, to Dunn and Gillam and subsequently executed by J. J. Eaves, curator, was returned to my office executed in that manner; I recommended its approval to the Secretary of the Interior.

Q. Now, at the time that it was returned to your office executed by Eaves, that is the Thomas lease, were you advised what part or portion of that lease was to be assigned to Mullen by Dunn and Gillam, lessees?

A. No, it was my understanding that these people were not business associates, in fact they were *very strong competitors*, and it was difficult to get them together at all, and they had decided to form a corporation, and my report so shows, report of January 31st, transmitting the lease so shows.

A corporation was organized by Dunn and Gillam and Mullen to take over the lease—its name is Bull Head Oil Company; I recollect

how the corporation got its cognomen; 'I recollect very distinctly that when Mullen was in my office, or perhaps later at the conference at Ardmore, it was almost impossible for me to make either one of them talk sense about the matter, and I said if the two sides didn't get their bull heads together themselves I would have to do something to make them, and I think it got the name right then; ' I remember the filing in the office of the assignment from Dunn and Gillam to the Bull Head Oil Company—the assignment of the whole lease; I recommended the approval of the assignment to the Secretary of the Interior; I don't remember how the stock was to be divided, but suppose the papers showed at that time, as we required a statement of that kind to be filed and to go to the Department along with the papers; the rules and regulations of my Department required the Bull Head Oil Company as assignee of the lease to show who its stockholders were, and no doubt such statement was filed, but I don't remember the details; my Department also required the Bull Head, as the prospective assignee, to make a financial showing of its ability to develop the property before I would recommend the approval of the assignment; such a financial showing must have been made by the Bull Head Oil Company or I would not have recommended the approval of the assignment; affidavits were required with all applications for approval of assignments showing the capital stock paid in; I remember that 'when the terms of the proposed compromise between Dunn and Gillam on the one hand, and Mullen on the other was under negotiations,' I made

suggestions and advised them in regard to eliminating one of the conflicting guardians.

Q. Why did you make that suggestion?

A. The principal thought I had in insisting upon a compromise so that one lease or the other could be legally approved so as to have the property developed and protected, and if there were two guardians who were going to litigate over who should have the fund, the royalty, the minor might not get the benefit of it for sometime, and I thought in an adjustment of the matter one guardian or the other could be induced to withdraw.

When I was in Ardmore discussing with the parties the settlement I am quite sure I visited the forty acres of land in question; it must have been in December, 1913, or in January, 1914, 'I am not sure whether I went out on that particular trip, or just prior thereto, or thereafter, but it was sometime when that thing was before me;' as stated by me I directed the Oil Inspector to investigate the situation with respect to the bonus, to increasing the bonus, and 'he made a report to me recommending some increase, which I approved and required the lessees to comply with;' my Oil Inspector, as I recollect, recommended 'that the lessees be required to pay a bonus of \$2000.00 out of the first oil produced from the land, after deducting out the one-eighth royalty;' the lessees agreed to pay that and they furnished a surety bond guaranteeing the performance of that obligation; Dunn and Gillam agreed to pay that 'and if they assigned it, the assignee accepted the obligation'."

When this matter was fresh in Mr. Kelsey's mind in January, 1914, he made a full written report to the Commissioner of Indian Affairs in a letter of January 31, 1914 (Rec., p. 106), which letter is as follows:

“Union Agency,

Muskogee, Okla., Jan. 31-1914.

The Honorable,
Commissioner of Indian Affairs.

Sir:- There is respectfully submitted herewith an oil and gas mining lease covering certain land in the Chickasaw Nation, executed as follows, in favor of T. H. Dunn and J. Robert Gillam: (Description here omitted.)

The records of the office show that this is the first lease filed by these lessees as copartners, and although both have other Department lease holdings it does not appear that either is in any manner interested in more than the maximum acreage. On Form B they state that they have combined resources amounting to \$100,000 with at least \$5000 available for development of this lease. Neither of these lessees is shown to be interested with any firm or corporation doing an interstate pipe line business in Oklahoma, and both the lessees and the surety on their bond are in good standing with the Department.

There was filed with the above lease copy of letters of guardianship issued to Atha N. Thomas as guardian of Allie Daney, a minor, by the County Court of LeFlore County, Oklahoma, dated July 24, 1911, and order of said County Court confirming this contract of lease in favor of Dunn and Gillam.

On August 23, 1913, there was filed with this office lease executed by J. J. Eaves, Curator of Allie Daney, a minor, *in favor of J. S. Mullen, dated August 18, 1913.* Accompanying this lease were letters of curatorship issued to J. J. Eaves by the United States Court for the Southern District of Indian Territory, dated November 8, 1905, *and an order of the County Court of Love County, Oklahoma, to which county this curatorship case was transferred after statehood confirming the contract of lease to J. S. Mullen.* This lease described all of the land embraced in the lease executed in favor of Dunn and Gillam, as well as other lands allotted to this lessor.

The respective lessees were notified that their leases conflicted and each responded with a brief protesting against the approval of the other lease. *The arguments presented on both sides were to the effect that the guardian or curator who executed the other lease was not the legal guardian or curator, and therefore had no authority to lease the land in conflict.* ***

The conflict over the matters of guardianship arising, it was thought necessary to hold a hearing, which was accordingly done, at Muskogee, Oklahoma, on December 13, 1913, and the briefs above referred to, together with copy of the testimony taken at this hearing, are transmitted herewith.

The facts in the case present only one question for consideration; *which was the legally appointed guardian entitled to act for Allie Daney at the time the leases were executed?* It appears that this office would not have been warranted in making a favorable recommendation on eith-

er of the leases *until the court had determined which was the legal guardian or curator.* It appears, also, that there was filed in the County Court of Love County a petition for the removal of the matter of the guardianship or curatorship of Allie Daney, a minor, to the County Court of LeFlore County, Oklahoma, where the minor has always resided, in order to finally determine the matter of guardianship. This action was resisted by J. J. Eaves, curator, who desired to have the case transferred to Carter County, Oklahoma. This cause came on for hearing on October 13, 1913, and by order of the court was transferred to LeFlore County, from which decision an appeal was immediately taken.

From the attitude of the parties concerning the matter of guardianship it appeared that *endless litigation* was at hand, and consequently the leases might be held up indefinitely awaiting final action by the courts.

With the interests of the minor in view, I communicated with the lessees of the conflicting leases with the object of holding conference with them or their attorneys to the end that arrangements might be made for protecting their interests as well as those of the minor lessor.

At the conference subsequently held, a compromise was effected, wherein J. S. Mullen, lessee in the prior lease, *requests the Department to disapprove his lease in so far as it covers the land described in the lease to Dunn & Gillam. J. J. Eaves, as curator of Allie Daney, has entered into the execution of the lease in favor of Dunn & Gillam, to which the County Court of LeFlore County has given its approval.*

It is further agreed between the parties that they shall organize an oil company, the sole stockholders in which are to be parties lessee in these two leases. To this company Dunn & Gillam have agreed to assign their lease in full. As it will take some time to have the assignment papers executed it is thought advisable to transmit the lease with recommendation for approval at once. Upon return of the parts, if the lease is approved, same will be held in this office pending the filing of the proposed assignment thereon.

On January 24, 1914, the United States Oil Inspector reported that the bonus of \$70.00 paid by Dunn & Gillam was inadequate, and advised that it is to the best interests of the minor that in lieu of an additional cash bonus to be paid at this time, the lessees be required to pay a further bonus of \$2000.00, to be taken out of the proceeds of the sale of the first oil produced, and to be paid in monthly installments at the rate of 25% of the gross monthly runs exclusive of royalty interests at 12½ per cent recited in the lease.

Messrs. Dunn & Gillam have entered into a stipulation in which they have agreed to pay the bonus consideration precisely as above recommended, and this stipulation has been made a part of the lease. Special bond of \$2000, with the Southern Surety Company as surety, guaranteeing the performance of the obligations assumed in this stipulation has been prepared and forwarded to Ardmore, Oklahoma, for the signature of the lessees.

From the report of Field Clerk Mills, dated December 11, 1913, and other reports received

at this office, it is known that developments have already reached the lands owned by Allie Daney, and activities there admit of no doubt that the lands of this minor are in great danger of being drained of oil, there being already two wells in operation, wells to off-set which should be drilled at once.

In view of the facts set out above it is respectfully recommended that this lease be immediately approved to extend to November 16, 1921, during minority of lessor, and as much longer thereafter as oil or gas is found in paying quantities, together with accompanying bond, and that the office be advised by wire in order that the lessees may begin drilling operations without further delay.

Respectfully,

DANA H. KELSEY,

United States Indian Superintendent.

P. S. The Mullen lease, which he asks to be disapproved, in so far as the enclosed lease is concerned, *also covers considerable land in another location*, which is not being drained, and which lease is not yet ready for submission, but will be forwarded later, as soon as steps can be taken in due course of procedure to have one of the guardians discharged and the other held to be the only legal guardian. The lessees adjoining the forty acres in question have just commenced to take much oil within the last few days, which will begin to drain this forty acres. Therefore, early action is necessary. Messrs. Dunn & Gillam are ready to move in a drilling outfit immediately.

D. H. K."

Again, and on April 5, 1914 (Rec., p. 115), Mr. Kelsey makes another written report to the Commissioner of Indian Affairs submitting to the Secretary the assignment from Dunn and Gillam to the Bull Head Oil Company, in which he again reviews the compromise agreement between the parties, the organization of the Bull Head Oil Company, the assignment of the Gladney lease to the Bull Head Oil Company and a general outline of the situation. In this letter of April 5, Mr. Kelsey submits to the Secretary for approval the *assignment from Dunn and Gillam to the Bull Head* and also the assignment from J. W. Gladney to the Bull Head, and in detailing the origin of the Bull Head, says:

“The organization of this company was in accordance with an agreement entered into between J. S. Mullen, lessee under lease No. 27,983, now on file in this office awaiting completion thereof, and T. H. Dunn and J. Robert Gillam, lessees under lease No. 27956. These leases were in conflict as to all lands described in the subsequent lease. In effecting this compromise the parties lessees entered into a stipulation wherein J. S. Mullen, lessee in the prior lease, requested the Department to disapprove his lease insofar as it covers the lands described in the subsequent lease to Dunn and Gillam, and recommendation to that effect will be made when lease No. 27983 is forwarded to the Department for consideration, in consideration of Dunn and Gillam assigning their lease after approval thereof to an oil company to be sub-

sequently organized, the stock to be equitably distributed between the contesting parties. * * *

It is in pursuance of this agreement that the assignment of lease No. 27965 from Dunn and Gillam to the Bull Head Oil Company is now being submitted to the Department for consideration."

These reports of Mr. Kelsey were introduced in evidence by the plaintiff.

L. S. Dolman, witness for defendant, testified as follows (Rec., p. 142):

"I have examined defendants' Exhibit 9; this agreement was presented to Mr. Kelsey, the Indian Agent; when the settlement was made and agreed upon in the form of a contract we presented the whole thing with the assignment to Mr. Kelsey; Mr. Kelsey was here some time in January, 1914, and he 'called us together and notified us *he was going to reject both leases unless we got together and compromised and we then held a conference and agreed we would split the stock and organize this stock company*. Split the stock between the two lease holders. We also agreed we would ask for a refusal of the Mullen lease and Mr. Eaves would sign the Thomas lease and we would then go before the County Court of Love County and have the lease approved as requested by Mr. Kelsey.'

Q. Was this done?

A. Yes, sir."

J. S. Mullen (Rec., p. 160), testified as follows:

"I am the same J. S. Mullen who obtained

a Departmental oil lease from J. J. Eaves, curator of Allie Daney, on the forty acres of land executed on August 13, 1913; when I got the lease I had Mr. Adams, my attorney, file it with the Secretary of the Interior's representative at Muskogee; after filing this lease I learned that Dunn and Gillam had leased from A. N. Thomas, guardian; we had a contest before the Indian Department's office at Muskogee; this contest brought about strained relations and the feeling became bitter; Mr. Kelsey, Indian Superintendent, took steps to get Dunn and Gillam and myself together and he came here to Ardmore and he had us come to Muskogee; Mr. Dolman was an attorney for Dunn & Gillam and we went to Muskogee and Mr. Kelsey *told us he would not approve either one of the leases if we did not get together*; after that we got together but the feeling between us was so bitter and so obstreperous that Mr. Kelsey named us the Bull Head Oil Company—Mr. Kelsey suggested it; I have examined defendants' Exhibit No. 9, being the *compromise contract of January 9, 1914*, with respect to the Gladney lease will say Dunn and Gillam would not yield until we agreed to put in the Gladney five-acre lease, one-half of which indirectly went to pay Dunn and Gillam's attorney, Dolman."

Frank M. Adams (Rec., p. 159) testified as follows:

"Mr. Kelsey came to Ardmore and we discussed the matter a number of times; the contract of January 9, 1914 (the settlement agreement, defendants' Exhibit 9), was exhibited to Mr. Kelsey and we discussed it; the compromise contract between Dunn and Gillam and

Mullen was made by the Dunn and Gillam faction and ourselves at the suggestion of Mr. Kelsey; he came here to Ardmore and was very much irritated at the fact that we were permitting offset wells to be drilled against the minor's property and no lease yet on the minor's property, and said the two factions must get together and thereupon some member of our faction (the Mullen faction) *went to Dunn and Gillam* and they said they would compromise provided we would get the Gladney five-acre lease transferred to the Bull Head and then we would split the stock fifty-fifty—that is, one-half to Dunn and Gillam and the other half to Mullen and his associates; *the Gladney five acres joins the Allie Daney forty acres.*"

The alleged compromise agreement between Dunn and Gillam, on the one hand, and Mullen on the other (Rec., p. 135), is as follows:

COMPROMISE AGREEMENT.

"*Agreement*, between J. S. Mullen, party of the first part, and T. H. Dunn and J. Robert Gillam, parties of the second part:

Witnesseth: That whereas there is now pending before the Department of the Interior for approval oil and gas leases as follows:

The oil and gas lease executed by J. J. Eaves, curator of Allie Daney, a minor, approved by the County Court of Love County, Oklahoma; the oil and gas lease executed by A. N. Thomas, guardian of Allie Daney, a minor, approved by the County Court of LeFlore County, Oklahoma; both of which said leases cover the W2 of SW4 of SW4, and S2 of NW4

of SW4 of Section 4, Township 4 South, Range 3 West; and

Whereas, said parties have agreed upon a settlement of the differences concerning the same:

Now, therefore, as a memorandum of said settlement, it is hereby agreed that said party of the first part will take such action as will result in the Dunn and Gillam lease being executed properly by J. J. Eaves, as curator of Allie Daney, and the curatorship proceedings transferred to LeFlore County, Oklahoma, and that said J. J. Eaves will resign from said curatorship.

That a corporation will be organized under the name of the Bull Head Oil Company, or such other name as will be acceptable, with a capital stock of eighteen thousand (\$18,000.00) dollars; that said parties of the second part shall assign to said corporation, said lease, upon its approval by the Secretary of the Interior.

That said party of the first part will cause to be assigned to said corporation what is known as the 'Gladney' oil lease, consisting of five (5) acres of restricted lands, being the W2 of SW4 of NE4 of SW4 of Section 4, Township 4 South, Range 3 West; all of which assignments shall be filed with the Department of the Interior, and such action taken as will perfect the title to the same in said corporation to be organized.

That upon the incorporation and organization of said company, and in consideration of the said assignments, stock shall be issued to

party of the first part, or such persons as he may designate, in the amount of \$8,000.00, and to the parties of the second part, or such persons as they may designate, stock in the amount of \$8,000.00, and there shall be issued to L. S. Dolman \$1,000.00 of said stock, which shall be in full payment to him of legal services performed heretofore, and for the incorporation and organization of said company, and perfecting of the title to said leases in said company and no further. That \$1,000.00 of non-voting stock shall be issued in the name of J. W. Gladney, and said J. W. Gladney, his heirs, administrators and assigns, shall participate in all the revenues and profits of said company, but that said stock shall be marked non-voting and remain in the care and keeping of the Secretary of said corporation.

It is further agreed that all expense necessary to the perfecting and approval of said lease, and the incorporation and organization of said company, shall be borne equally by the parties hereto.

In witness whereof, we have hereunto set our hands in duplicate, on this the 9th day of January, 1914.

J. S. MULLEN,

Party of the First Part.

T. H. DUNN,

J. ROBT. GILLAM,

Parties of the Second Part.

Mullen's original lease from Eaves covered 130 acres (Rec., pp. 214-215), and in accordance with the compromise agreement "Mr. Mullen, lessee under

the separate lease executed to him by Eaves, cura-
tor," as testified to by Mr. Kelsey, "requested me
to disapprove that lease insofar as this forty acres
of land covered in the Thomas lease was concerned
and 'he made that request as a part of this compro-
mise agreement with Dunn and Gillam'."

*It was immaterial to the Department and to the
parties whether Thomas joined in the Eaves lease to
Mullen or Eaves joined in the Thomas lease to Dunn
and Gillam, that being a mere formality, it being the
intention of all parties that if the Thomas lease to
Dunn and Gillam was good Mullen should have an
interest therein and if the Eaves lease to Mullen, con-
firmed by the County Court of Love County, August
19, 1913, was good, then Dunn and Gillam should
have an interest in that lease.*

Obviously when the parties came to the practical side of the compromise they found it expedient for Eaves to execute the Thomas lease instead of Thomas executing the Eaves lease to Mullen because Mullen's lease from Eaves covered 130 acres, whereas the parties were only dealing with the 40 acres alone, described in the Thomas lease to Dunn and Gillam. As stated, the Eaves lease to Mullen covered 130 acres, including the 40 acres involved in this case (Rec., p. 214), and that is admitted in the Government's bill, paragraph 11, record, page 10. This is clearly shown by the testimony of Mr. Kelsey, Indian Superintendent, as well as the testi-

mony of other witnesses. The appellant introduced in evidence as a part of its case in chief the cross examination of Mr. Kelsey set forth in his deposition taken by defendants, and read the following to the court (see Rec., p. 104), to-wit:

"He was only interested in having one of the guardians out of the way and proper guardian appointed for the minor; it was absolutely immaterial to him which one got out of the way or which one held the custody of the property; the lease executed by Eaves to Mullen contained in addition to the small tract in the heart of the Healdton field, some other land, that land was to be eliminated from the Mullen lease; Mullen asked that the lease be disapproved as to this forty acres involved, but he didn't ask that he disapprove the remaining lease on some ninety acres, but the lease was kept in his office at Muskogee allowing Mullen a short time to take that lease to the LeFlore County Court to get Thomas to join as to the other part of this land."

Mr. Kelsey further testified (Rec., p. 172):

Q. "Did you indicate to Mullen and Dunn and Gillam how they could settle the controversy between them; that is the procedure, or method by which they could unite their interests?"

A. They, of course, asked me that when we finally got them so they would talk to each other, and I said it didn't make any difference to me whether the Dunn-Gillam lease or the Mullen lease was approved; that if the LeFlore County lease was the one to be approved, the Love County curator should join. If the Love Coun-

ty lease should be approved, that the LeFlore County guardian should join. If one would withdraw or agree to assign an interest to each other, it was a matter absolutely immaterial to me. I was doing what I thought was the duty of an executive officer to protect the interests of the minor.

Q. Did you make any statement to Dunn and Gillam on the one hand, and Mullen on the other, that if they would have both guardians join in one or the other of the leases, and the lessee make an assignment to the other contesting lessee, that you would make any recommendation in regard to the approval of that assignment to the Secretary of the Interior?

A. I did. I said if they did not care to entirely withdraw, one side or the other, that I would recommend an assignment of such part interest as they might agree among themselves upon.

In other words, I suggested to them that if Eaves joined in the Dunn and Gillam lease I would recommend the Secretary to approve an assignment of an interest in that lease from Dunn and Gillam over to Mullen, *or vice versa*; * * * I think they advised me 'that they would have both guardians join in one lease, and I sent my Oil Inspector to Ardmore with the original papers and instructed him to investigate the property and make a report to me as to what, if any, increase of the bonus should be assessed up against the lease that we would finally recommend for approval. He was to take these leases to Ardmore for the purpose of allowing one of them to be joined in by the other guardian'; *my Inspector took the Eaves lease and the Thomas lease both to Ardmore*

with him 'so that one or the other of them could be executed by the other guardian'; the lease executed by Thomas, guardian, to Dunn and Gillam and subsequently executed by J. J. Eaves, curator, was returned to my office executed in that manner; I recommended its approval to the Secretary of the Interior."

Mr. Kelsey further testified (Rec., p. 176) as follows:

"I do not remember whether or not I was advised at the time the compromise was made between the parties whether the Eaves lease would be eliminated or the Thomas lease would be eliminated but 'the discussion was that one of them would be, and I rather think that Eaves was to be eliminated and Thomas was to remain as guardian'; the purpose in eliminating one of them was to eliminate any controversy about who was entitled to the royalty; I remember making some suggestion that both Thomas and Eaves resign and let one of our Government men or some one they would select be appointed in the county in which the minor resided and settle the trouble."

Equity regards the substance instead of the form, and because by a mere coincidence Eaves joined in the Thomas lease instead of Thomas joining in the Eaves lease to Mullen, the Government claims that the lease should be cancelled or that the interest Dunn and Gillam acquired under the Eaves lease through Mullen, *admittedly free from fraud*, should be impressed by a decree in equity as trust property for Allie Daney.

MULLEN THE ONLY PERSON HAVING RIGHT TO
COMPLAIN.

The Eaves, curator, lease to Mullen and the Thomas lease to Dunn and Gillam were both Departmental leases on exactly the same form, containing the exact same covenants, conditions and provisions, the bonus being subject to determination by the Indian Superintendent in the first instance and finally by the Secretary of the Interior. Mullen's surrender of the Eaves lease approved by the County Court of Love County on August 19, 1913, for a new lease from Eaves, curator, to himself and Dunn and Gillam, Dunn and Gillam being *trustees* for Mullen and the Bull Head Oil Company under the compromise agreement suggested by the Indian Superintendent, *in no way injured or damaged Allie Daney*.

Shorn of its trappings, the Government's case is based on this contention: That Allie Daney is entitled to a decree in equity adjudging Dunn and Gillam to hold in trust for her all the interest they acquired in the oil and gas leasehold rights in her 40 acres because they used a fraudulent lease from her counterfeit guardian as a means of forcing Mullen to give them half interest in a valid lease on her land. If Dunn and Gillam had occupied any *fiduciary relationship* to Allie Daney by which they profited individually to her injury, the law quoted in the Government's brief would be applicable. Dunn

and Gillam occupied no fiduciary relationship either in fact or in law to Allie Daney, and we are unable to find any legal proposition or any principle of equity upon which the Government can place its feet as a foundation for a decree in this case. Mullen is the only one who had any right to complain. He lost a half interest in this lease to Dunn and Gillam, but Allie Daney lost nothing, nor did Dunn and Gillam acquire anything from her. It is difficult to see how the court can hold in one breath that Allie Daney lost nothing, then hold in the next that Dunn and Gillam are her trustees ex maleficio of all interest they acquired in the lease through a compromise agreement with Mullen.

ALLIE DANNEY SUFFERED NO INJURY.

Two things must concur to constitute actionable fraud—inequitable conduct and injury. In other words, fraud and damage must concur before a court of equity will grant any relief against a judicial sale.

The lease required court approval and partakes of the nature of a judicial sale.

Story's Eq. Juris., 14th ed., Vol. 1, sections 289 and 290 are as follows:

"Sec. 289. And in the next place the party must have been misled to his prejudice or injury; for courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations or correcting unconscientious acts, which are followed by no loss

or damage. It has been very justly remarked, that to support an action at law for a misrepresentation there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff. And it has been observed with equal truth by a very learned judge in equity, that fraud and damage coupled together will entitle the injured party to relief in any court of justice.

“Sec. 290. In order to sustain an action on a fraudulent contract, it is necessary that there be both allegation and proof of damage, at least to some extent. Fraud must concur with damage to be actionable. However grievous the fraudulent conduct may have been, no action will ordinarily lie if the defrauded party ratified the fraudulent act, whether with or without injury; and so, if he was not cognizant of the real facts until the transaction was entirely consummated, he cannot complain that a fraud has been perpetrated, if he has not been the loser thereby. It is fundamental, that no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action. If the deceit does not end in the making of the contract, but still further influences a party to the contract in his conduct under it, it is obviously a deceit of a continuous nature, of which the injured party may justly complain.”

Pomeroy's Eq. Juris., 2nd ed., Vol. 5, section 2088, announces the principle as follows:

“It is not the province of equity to correct mere technical wrongs. A party seeking its aid must show some substantial injury. It frequent-

ly happens that a judgment is obtained by fraud, accident, or surprise, although the same result would be reached if an adversary trial had been had. In such a case the defendant at law is equitably bound to pay the amount of the judgment, and equity will not interfere to relieve him. The fraud, accident, or surprise is, in such a case, a mere technical wrong."

In *Bigby v. Powell*, 25 Ga. 244, 71 Am. Dec. 168, the court said:

"Again, to be entitled to the relief sought, the party must show, not only that he was misled and deceived, but that he was damaged thereby. If no damage resulted from the fraud, he is entitled to no relief."

—26 Corpus Juris, p. 1167;
Walcott v. Wise, 130 N. E. 544;
McNair v. Toler, 21 Minn. 175;
Little Rock & H. S. W. R. Co. v. Newman, 84 S. W. Rep. 727;
Mass. Benefit Life Ass'n v. Lohmiller, 74 Fed. Rep. 23;
Vanfleete's Collateral Attack, Sec. 553;
Meikel v. Boarders, (Ind.) 29 N. E. Rep. 29.

In *Rock, etc., Ry. Co. v. Wells*, 61 Ark. 354, 54 Am. St. Rep. 216, the Supreme Court of Arkansas said:

"It is said that the trial court committed error in impaneling, and also in charging, the jury. But errors alone are not sufficient to warrant the interposition of the court of equity. It must clearly appear that it would be contrary

to equity and good conscience to allow the judgment to be enforced, else equity declines to impose terms upon the prevailing party."

To the above opinion of the Supreme Court of Arkansas, Mr. Freeman, in 54 Am. St. Rep. 222, attaches a long and exhaustive annotation. The annotator announces the rule as follows:

"It is not sufficient, in a suit for relief against a judgment or other decision, to show that it was procured by fraud or was due to surprise, mistake, accident, or some other ground for the interposition of equity, *if the defendant has suffered no injury from it*, or if the same decision must have resulted had there been a trial of the cause upon the merits. Whatever be the ground for relief, the defendant must, in addition, show that the judgment or decision of which he complains is *unjust*. If, being a plaintiff, he had no cause of action, or, being a defendant, he had no just ground of defense, but some wrong was done him during the prosecution of the action whereby a judgment was entered wrongfully or even fraudulently, he will be left to his legal remedies, if any he has. Therefore, in every bill seeking relief against a judgment, *merit* on the part of the complainant must be shown, otherwise it will not be deemed sufficient to call for the interposition of the extraordinary remedies and powers of equity."

The annotator cites a long list of authorities in support of this well settled rule.

In *Shultz v. Shultz*, 36 Ind. 323, 43 Am. St. Rep. 325, the court said, in regard to a judgment:

“It imports that it was just, equitable, lawful and right, to set aside the appellant’s deed and subject the property to sale to pay the debts of her husband, with absolute verity. That being true, for the purposes of this case it makes no difference how wicked the conspiracy was that is charged against all the parties to bring about that result, as the result was just, right, and lawful, the conspiracy and evil acts charged *did not harm appellant*, did not deprive her of any legal right, and, therefore, no ground to complain is shown.”

In *Hartford Fire Ins. Co. v. Meyer*, 30 Neb. 135, 27 Am. St. Rep. 385, the court said:

“It will be observed that there is no statement of facts showing the nature of the defense of the plaintiff against the payment of the loss. This was necessary in order to entitle the plaintiff to relief. Where a court of equity proceeds to set aside a judgment at law, it proceeds upon equitable consideration only. If the judgment rendered is not inequitable as between the parties, no matter how irregular the proceedings may be, a court of equity will not interfere.”

In *Massachusetts Benefit Life Ass’n v. Lohmiller*, 74 Fed. Rep. 23-28, the Circuit Court of Appeals of the United States for the Seventh Circuit said:

“The rule is invariable that equity will not enjoin a judgment procured through fraud or artifice unless the complainant can aver and prove that it had a good defense upon the merits.”

The court cites and approves the language of Chief Justice DIXON, in *Ableman v. Roth*, 12 Wis. 81, as follows:

“Courts of equity will not interfere to grant a new trial where no substantial right has been lost, and no unfair advantage gained, simply because, *by some trick or artifice*, a judgment which is just or equitable in itself has been obtained in advance of the time when it would otherwise have been rendered.”

One of the strongest cases sustaining the rule here invoked is the opinion of the Supreme Court of the Territory of Oklahoma, in *Hockaday v. Jones*, 56 Pac. Rep. 1054. After citing a long list of authorities in support of the conclusions of the court, the principles are embodied in the syllabus prepared by the court as follows:

“1. A judgment rendered against a defendant by default upon constructive service by publication, in an action for goods sold and delivered —there being no personal service, and no appearance of the defendant—is absolutely void, where, at the time of the commencement of such action and of the making of such publication the defendant was a resident of the territory, and, by due diligence, summons could have been personally served upon him.

“2. A party against whom a judgment has been rendered by default, which judgment is void for want of jurisdiction over the person of the defendant, cannot maintain an action to enjoin an execution on said judgment, or to annul such judgment, unless he makes it appear, both from

his pleadings and proof, (1) that he has a meritorious defense to the cause of action on which the judgment is based; (2) that he has no adequate remedy at law; and (3) that the existence of such judgment is in no wise attributable to his own neglect.”

In *Wilson v. Shipman*, 34 Neb. 573, 33 Am. St. Rep. 660, the court said:

“But there is another reason why the judgment should be reversed. The principal object of vacating a judgment is to permit an opportunity for a full examination of the matters in controversy; therefore, if the defendant ask to have a judgment against him set aside, he must allege, and if necessary prove, that he has a valid defense to the action. In *Gerrish v. Hunt*, 66 Iowa 682, it is said: ‘This relief (by injunction) will not be granted if it appear that the party holding such void judgment has a valid claim whereupon it was rendered, to which there is no defense. The general principle underlying the jurisdiction is that it must be against conscience to execute the judgment sought to be enjoined. Therefore, if there is no evidence of a defense on the merits, or that the judgment is contrary to equity and good conscience, it will not be enjoined.’ High on Injunctions, Sec. 86; *Ableman v. Roth*, 12 Wis. 90.”

There must not only be fraud, but there must be damage or injury. No matter how dark and devious the conspiracy may be; no matter that the conspiracy accomplishes its purpose; no matter that its purpose was accomplished by wrongful means—that

is, by trickery and schemes—yet the party seeking to invoke the jurisdiction of equity to set aside the judgment must show affirmatively, both by his pleadings and the proof, that he suffered injury on account of the judgment. He must show that he has suffered damages.

In other words, it must be shown that it would be inequitable and unjust for the judgment to be enforced. If the party seeking to invoke the jurisdiction of equity to set aside a judgment obtained by fraud has no merit in his defense, then he will be denied relief, no matter how much fraud was perpetrated in obtaining the judgment. Likewise with respect to contracts.

In an extensive annotation to the case of *Felt v. Bell*, decided by the Supreme Court of Illinois in 1903, and reported in 10 Am. & Eng. Dec. in Equity, p. 35, the learned annotator lays down the rule as follows and supports the same with a large number of cases, to-wit:

“In order to justify the cancellation of an instrument, it must appear that some injury to the complainant has been done, or is threatened. While a court of equity, in a proper case, has full power to order the cancellation of bonds, or other written instruments, yet, before this power will be exercised, it must be made to appear that a necessity exists to prevent an irreparable injury, which a court of equity alone can avert.”

ILLUSTRATIVE CASES.

In *Snyder v. Hegan*, 40 S. W. Rep. 693, the Court of Appeals of Kentucky refused to rescind a contract between partners and a purchaser of their business, although one of the partners had made one of the joint purchasers a present of \$3,000.00, to be credited on his part of the contract price. The court held that the goods were worth the \$15,000.00, and that, therefore, the joint purchaser complaining was not injured, although the other purchaser had received a gift of \$3,000.00 from the seller—the said \$3,000.00 to be credited on his part of the purchase price. The party receiving the \$3,000.00 was not complaining in the litigation, but the other purchaser was seeking a rescission. The court refused to grant the relief, and said:

“Fraud without damage or damage without fraud, gives no cause of action.”

In *Belmont Mining & Milling Company v. Costigan*, 42 Pac. Rep. 647, the Supreme Court of Colorado said:

“We have examined the complaint with some care, and find it contains a sufficient statement of a cause of action for the rescission of the contract, with the exception that it does not state with sufficient particularity that the plaintiff was legally damaged by the alleged misrepresentations and deceit of the defendants. In such an action there must be alleged ‘the telling of an untruth, knowing it to be an untruth, with intent to induce a man to alter his condition,

and his altering his condition in consequence, whereby he sustains damage'."

In *Cunningham v. Shields*, (Tenn.) 4 Heywood 299, the Supreme Court of Tennessee said:

"Fraud, to be relieved against, must be operative. It is not sufficient to say that an act was done with fraudulent intent. It must in its effect be injurious to the complaining party; otherwise it is not entitled to relief."

In *Marringer v. Dennison*, 20 Pac. Rep. 391, the Supreme Court of California, in refusing rescission of a contract sought to be set aside on the charge of fraud in the substitution of one kind of property for another, said:

"The value of the property alleged to have been substituted is not stated, nor are there any facts alleged from which it can be inferred that it was of any less value than that originally contracted for. Therefore, no damage is shown that could have been the result of the fraud charged. It is true, the complaint alleges that the property first contracted for increased largely in value, and was worth more than that which plaintiff was to convey to defendant; but the same may have been true of the property embraced in the second agreement. If so, the plaintiff was not injured by the fraud alleged."

In a suit to set aside a contract on account of fraudulent representations, the Supreme Court of California, in *Bailey v. Fox*, 20 Pac. Rep. 871, said:

"In other words there is nothing in the complaint to show that the plaintiff was in any

way injured by the representations, admitting them to have been false. The findings make no better case for the plaintiff than the complaint. *In order to entitle a party to rescind a contract, he must not only show the fraud, but that as a result thereof some damage has resulted to him.*"

This same doctrine is announced by the Supreme Court of the United States in *Ming v. Woolfolk*, 116 U. S. Rep. 599, 29 L. ed. 740. See, also:

Bispham's Equity, 5th ed., Sec. 217;
Carvill v. Jack's Adm'r, 43 Ark. 454;
Lewis v. Cobbin, 81 N. E. 248 (Mass.);
Bailey v. Oatis, 85 Kan. 339, 116 Pac. 830.

POINT FOUR.

The signing and executing of the lease by J. J. Eaves, as curator of Allie Daney, although the name of J. J. Eaves does not appear in the body of the lease, made it a valid lease from J. J. Eaves, curator.

Counsel for the appellant are mistaken in their contention that either the Oklahoma Supreme Court or the weight of authority holds that a lease or deed is void as to a party signing it unless the name of such party is set forth in the granting or demising clause of the instrument. There are some authorities apparently holding that the name of the grantor or lessor must appear in the granting or demising clause, but an analysis of the cases shows that the true rule is this:

"If from the deed or lease in its entirety enough is shown from which, by the aid of extrinsic evidence, the name or names of the lessors or grantors can be made certain, then the lease or deed is binding on the party signing it."

In other words, it is not necessary that the name "J. J. Eaves" appear in the body of the lease. The lease (Rec., p. 16) does not purport to be made by Allie Daney or by a competent lessor. It purports on its face to be made by a representative of the al-lottee, to-wit, a guardian. It is true the clause in the lease reciting the parties, not the demising clause, names A. N. Thomas as guardian, but anyone examining the lease would at once discover that it was not made by Allie Daney in her own right, but made by a representative—a guardian—and this appears not only in the clause reciting the parties, but appears from the names signed to the lease, to-wit, A. N. Thomas, guardian, and J. J. Eaves, curator. Eaves did not sign his name individually but in his representative capacity and *it is obvious from the face of the lease that there was a question as to who was guardian—a question as to who had authority to represent Allie Daney—and therefore two parties signed as her representatives.*

Lowery v. Westheimer, 58 Okl. 560, 160 Pac. 496, relied upon by appellant's counsel, expressly holds that extrinsic evidence is admissible to show whether or not a party executing a deed was bound thereby as a grantor, and among other things said:

“In *Otis v. Pittsburgh Westmoreland Coal Co.*, 199 Fed. 87, 117 C. C. A. 598, the United States Circuit Court of Appeals for the Third Circuit said:

‘When in the performance of a written contract both parties give it a practical construction, before any controversy has arisen in regard thereto, such construction, rather than its literal meaning, will prevail; for, as Lord Chancellor SUDGEN, in *Attorney General v. Drummond*, 1 Dru. & Wal. 353, 366, affirmed 2 H. L. Cas. 337, said: “Tell me what you have done under a deed, and I will tell you what that deed means.” Unless the language is so clear as to admit of no reasonable controversy as to its meaning, the court is not likely to go astray if it enforces that construction which the parties, without coercion, have themselves acted upon. *District of Columbia v. Gallaher*, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. ed. 526; *Lowrey v. Hawaii*, 206 U. S. 206, 222, 27 Sup. Ct. 622, 51 L. ed. 1026; *Davis v. Alpha Portland Cement Co.*, 142 Fed. 74, 76, 73 C. C. A. 588; *Chicago G. W. Ry. Co. v. Northern Pacific Ry Co.*, 101 Fed. 792, 795, 42 C. C. A. 25; *Manhattan Life Ins. Co. v. Wright*, 126 Fed. 82, 87, 61 C. C. A. 138; *Central Trust Co. of N. Y. v. Wabash, St. L. & P. Ry. Co.*, (C. C.) 34 Fed. 254.’

“In *Old Colonial Trust Co. v. Omaha*, 230 U. S. 118, 33 Sup. Ct. 972, 57 L. ed. 1410, the court said:

‘Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time be-

fore it comes to be the subject of controversy, is deemed of great, if not controlling, influence.'

"In *American Soda F. Co. v. Gerrier's Bakery*, 14 Okl. 258, 78 Pac. 115, 2 Ann. Cas. 318, we said:

'Where a written contract contains provisions which render it uncertain or ambiguous, the court may ascertain and give effect to the mutual intention and understanding of the contracting parties.'

"And in *Rider v. Morgan*, 31 Okl. 98, 119 Pac. 958, we said:

'Where the meaning of the terms used in a written contract is not clear, the subsequent acts of the parties showing the construction they have put upon the agreement themselves are to be looked to by the court'."

Devlin, the leading and standard authority on Deeds, 3rd ed., Vol. 1, section 204, says:

"The question whether a person who signs a deed, but is not named in it as grantor, is bound by it, should, in the author's judgment, be *one of construction*, to be determined by reference to the circumstances connected with the transaction, rather than by a fixed and arbitrary rule of law. In several of the cases that have been cited in the preceding sections, the decision of the court was based upon the ground that a wife could not relinquish her right of dower, unless the conveyance contained apt words expressive of such an intent, and that by merely signing a deed in which she was not

mentioned, her claim of dower remained unaffected. Possibly, a distinction can be drawn between such cases and cases where the party signing was under no disability. *The general rule for construing all contracts is that if it appears by a contract that a party intends to bind himself, trivial inaccuracies will be disregarded, and, if the intention of the parties can be ascertained, courts will effectuate that intention.* Now, if a party signs a deed, he must do it for some purpose. It is in practice the general custom for deeds to be drawn by others than the parties to them. The scrivener may have omitted the name of the grantor, or by mistake may have inserted a wrong name. If such should be the case, and a party should sign a deed, intending to bind himself, all parties supposing he had executed an effectual conveyance, is it reasonable to say that the deed is nugatory because the party signing was not named in the conveyance? *The fact that he signs and delivers the deed should be entitled to greater consideration in determining whether he intended to convey his title, than the writing of his name in the deed by some one else.* It has been objected to this view, that the relations between the parties are to be determined from the language of the deed, and if that shows an intended contract between a party who does not execute the instrument, the party who does sign cannot be bound, because he is, so far as the deed itself evinces the intention of the parties, a person with whom no contract was intended to be made. But assuming that such an instrument shows that the contract was originally intended to be made between certain persons, and that is all that can be claimed, such an intention may

subsequently have been altered. If the name of the party originally mentioned in the deed should be erased, and the name of the party signing substituted, there can be little question that the party whose name was substituted, and who executed the instrument, would be firmly bound by the instrument. If he signs the instrument, though his name is not substituted or mentioned at all in the deed should not some effect be given to his act? We think so. While it may well be that in such a case he should not be conclusively bound, yet we think that by his signature and delivery of the deed, he should be held presumptively to have assented to its provisions; or, at all events, that his intention should be considered so uncertain and ambiguous that the court should, by reference to all the circumstances not tending to contradict the deed, but to explain the conditions surrounding its execution, attempt to ascertain his meaning."

Underhill on Landlord and Tenant, Vol. 1, section 238, says:

"The rule of the law of contracts that the parties to the contract must be certain or ascertainable is applicable to written leases. The general rules of law relating to the parties to a written contract require they should be either expressly named or indicated in such a way that their identity can be ascertained. Hence, if the parties to a written contract do not appear designated in the instrument itself, and if there is nothing in the transaction which shows who they are, the writing is void. Hence, good practice requires the names of the parties to the

lease to be stated correctly and filled in the body of the instrument, but a mistake in the name, whether of the lessor or of the lessee does not invalidate the lease if the parties can be ascertained either from the other elements of the description or from parol evidence. So, a mistake in the name of a party, whether of an individual or a corporation, will not invalidate the lease. *And even omitting the name of the lessor from the granting clause of the lease may be disregarded if it can be ascertained who he is.* A misdescription of the lessee or lessor in a lease where neither party is *misled thereby does not render the instrument invalid.* Thus the word 'incorporated' inserted after the names of the lessors who were in fact partners in business, does not in any manner affect the binding character of the lease, where the lessors in signing the lease signed as partners and not as a corporation. Under such circumstances, the lessee would be absolutely protected in paying the rent to the lessors as though they were a firm and in taking receipts from them in that capacity. A contract which would include a lease, obtained in good faith in the name of the firm, would be valid though only one person constituted the firm. The omission from the lease of the individual names of the members of the two firms who are named in the lease as lessor and lessee is not material nor are they released from their individual liability as the partners may by a subsequent ratification make the lease binding on them to the same extent as though their names were written in it. Hence, it follows that a party whose name was intended to be in the instrument but which was omitted from it may, *by his subsequent conduct in ac-*

cepting benefits of it, become liable as a party to it."

In *Texas Pac. Coal & Oil Co. v. Patton*, 238 S. W. 202, the Texas Supreme Court, on March 8, 1922, reviewed the authorities on this subject, including *Agricultural Bank v. Rice*, 4 How. 225, and expressly held that it was not necessary for the name of the grantor or lessor to appear in the body of the instrument if there was enough in the body of the instrument to indicate, with the aid of extrinsic evidence, the name of the grantor or lessor. In that case the court said:

“While it is necessary, under the authorities cited, that a person signing a deed should appear on the face thereof as a party thereto and a grantor therein, before such deed will be effective to convey his interest in the property described therein, *we do not think it is necessary that he should so appear by name*. In the case of *Creosoted Wood Block Paving Co. v. McKay*, 211 S. W. 822, 824, the Court of Civil Appeals for the Fifth District considered a mechanic’s lien contract in which the grantors were designated as, ‘We, A. C. McKay and wife, owners of the following described property.’ The granting clause of the instrument was:

‘We, the undersigned, do hereby expressly confess, admit, give, and grant * * * the mechanic’s, builder’s, contractor’s and materialman’s lien on said premises.’

“The testimonium clause was, ‘Witness our hands, etc.’ It was signed by both husband and wife and duly acknowledged. It was con-

tended that the instrument was void because the name of Mrs. McKay did not appear as a grantor on the face thereof. The court held it valid. We quote from the opinion in that case as follows:

‘While the premises of the deed must disclose certainly who the grantors are, it does not, in our opinion, require in every event the name of the grantor to appear therein. None of the cases cited will support such construction. The rule, as we have shown, is that one who does not appear on the face of a deed to be a party thereto or whose name is not recited therein is not bound thereby. “The requirement of the rule is met if, from the deed in its entirety, *enough is shown from which, by the aid of extrinsic evidence, the names of the grantors can be made certain.*” *Sloss-Sheffield Steel & Iron Co. v. Lollar*, 170 Ala. 239, 54 South. 272. The quotation is from the Alabama Supreme Court, which enforces the rule invoked in the case at bar, and asserts, in our opinion a sound, just, and reasonable application of the rule.’

“In the case of *Blaisdell v. Morse*, 75 Me. 542, the Supreme Court of that state sustained a deed in which the grantors were not named, but were described as, ‘*We, the heirs and devisees of Sarah Stearns.*’ The court, however, required some evidence that the signers were such heirs and devisees.

“In the case of *Sloss-Sheffield Steel & Iron Co. v. Lollar*, 170 Ala. 239, 54 South. 272, the court sustained a deed where the grantors were designated as ‘*Kessiah E. Adcock and her*

heirs,' and held that, inasmuch as Mrs. Adecock was living, the language used could only mean that the other grantors were her children.

"In the case of *Frederick v. Wilcox*, 119 Ala. 355, 24 South. 582, 72 Am. St. Rep. 925, the court sustained a mortgage in which only plural pronouns were used instead of names, and the grantors were described and designated as 'the undersigned.'

"In the case of *Vasquez v. Texas Loan Agency*, 45 S. W. 942, the Court of Civil Appeals for the Second District sustained a power of attorney and conveyance of land in which the only designation of the grantor was the pronoun I. Substantially the same rule is announced and applied in the following cases: *Bowles v. Lowery*, 181 Ala. 603, 610, 62 South. 107; *Sheldon v. Carter*, 90 Ala. 380, 8 South. 63; *Withers v. Pugh*, 91 Ky. 522, 16 S. W. 277; *Ins. Co. of Tenn. v. Waller*, 116 Tenn. 1, 95 S. W. 811, 813, 115 Am. St. Rep. 763, 7 Ann. Cas. 1018; *Madden v. Floyd*, 69 Ala. 221.

"We think the correct rule on the issue under consideration is that announced by the Supreme Court of Alabama, and approved and adopted in *Creosoted Wood Block Paving Co. v. McKay, supra.*"

The misdescription of the grantor in the body of a deed or lease may be cured by extrinsic evidence to identify the grantor signing his correct name to the instrument. Thus the Supreme Judicial Court of Maine, in *Kelleher v. Fong*, 79 Atl. 466, had under consideration a lease where the lessor was named as

Eng Fong, and executed by Charlie Fong. The court said:

“And the party mentioned in the lease as ‘Eng Fong’ is satisfactorily shown by the testimony considered in relation to the circumstances, to have been the same party who signed his name to the lease as ‘Charlie Fong,’ and the identical person who was then occupying the plaintiff’s store in question, and who had for seven years been recognized by the plaintiff as her tenant in that building.”

In *Montanye v. Wallahan*, 84 Ill. 355, the court said:

“Objection is taken to this lease because of a variance in name, William W. Montanye being written in the body of the lease, defendant’s true name being Wiley W. Montanye. The name signed is W. W. Montanye. The proof is, that the defendant signed the lease. It is his lease, then, and he is bound by it, *no matter by what name he may call himself in the body of the lease.*”

In *Julicher v. Connelly*, 102 N. Y. Supp. 620, the court held that a lease is not invalid because the word “incorporated” appeared after the names of the lessors who were partners when it is clear that none of the parties to the lease were misled thereby.

In *Hackett v. Marmet Company*, 52 Fed. 268, the Fourth Circuit Court of Appeals sustained a lease executed in the name of the Marmet Mining Company, although its correct name was Marmet Company. If extrinsic evidence is competent to re-

move an erroneous description of the grantor it certainly ought to be admissible to show a party executing an instrument intended to execute it as a lessor or grantor.

The Missouri Supreme Court in the recent case of *Driskill v. Ashley*, 167 S. W. 1026, reviewed the authorities on this subject and adopted and approved the New Hampshire decisions, and among other things said:

“In *Elliot v. Sleeper*, 2 N. H. 525, the court said:

‘And, for the purpose of our present inquiry, it may be admitted that the usage, however diversified in its forms, always requires the husband and wife so far to join as to convey at the same time, on the same paper, and both in language suitable to pass the title of real estate. Whether this requisition has here been fulfilled is a question of some difficulty, on both authority and principle. It cannot be doubted that the signature, sealing, and acknowledgment of this deed by the husband, being on the same paper with those of the wife, and in the usual form, are in themselves sufficient. But it is objected that he is not named in the deed as a grantor, and that, without being so named, the deed is not his deed, and in respect to him is altogether inoperative. But it seems well settled that whoever signs and delivers an unsealed writing is bound by the promises contained in it, though his name may not appear on the paper, except in his signature. *Little v.*

Weston, 1 Mass. 156; *Fisher v. Leslie*, 1 Esp. Cases, 426. This seems founded on the obvious and reasonable principle that such acts amount to an adoption of all which precedes the signature, and that no other legitimate cause for these acts can be assigned than a design to make all the promises, to which the signature is affixed, the promises of the subscriber. * * * in sealed instruments, such as bonds and wills, the same principle applies and appears to be supported by numerous authorities.'

"The situation in that case was much as in the case at bar. The doctrine of the *Elliot* case was reaffirmed by the New Hampshire Court in *Woodward v. Seaver*, 38 N. H. 29, and both cases quoted from and their doctrines approved by this court in the *Peter* case, *supra*."

In *Roberts v. McIntire*, 84 Me. 362, 24 Atl. 867, the court said:

"There are certain elementary principles applicable to the construction of written contracts which are matters of such common knowledge and universal acceptance as to render the citation of authorities a profitless task. There are pregnant legal maxims which are the deductions of reason and the conclusions of common sense, approved by the wisdom of ages. But their practical application must, in some instances, be qualified or restricted by technical rules, which ascribe definite meanings to particular expressions, in order to secure uniformity and to enable parties to understand the effect of the language employed in contracts made or accepted by them. All agree, however,

*that it is the constant desire of the law to uphold a contract, rather than destroy it; to effectuate the intention of the parties, and not to defeat it. * * * But with respect to conveyances of real estate, courts in modern times have shown more consideration for the substance of the contract than for the shadow, for the passing of the estate according to the intention of the parties than for the manner of passing it; and wherever the rules of language and of law will permit, that construction will be adopted which will make the contract legal and operative in preference to that which would have an opposite effect."*

Thus in *Sterling v. Park*, 58 S. E. 828, 13 L. R. A. (N. S.) 298, the Georgia Supreme Court had under consideration a deed in which M. C. Huntley was named as grantor and R. E. Park as grantee. The deed was signed and sealed by M. C. Huntley, W. H. Huntley, and the defendant. Neither W. H. Huntley nor the defendant was named in the deed as grantor. At the time the deed was executed the title to the land was in M. C. Huntley for life, with remainder to the other two parties signing the deed. The plaintiff contended that the deed was operative as a conveyance of the estate of all the signers, while on the other hand the defendant contended that as she was not named in the deed as a grantor it was not operative to convey her estate in remainder. The court fully discussed the form of deeds at common law, and pointed out the reasons why, under *modern conveyances*, the old rule requiring the name of all

the signers to appear in the body of the deed as grantors, in order to convey their interest or property, had become obsolete. The court sustained the deed as a conveyance of the interest of all the signers and said:

"The point in the case has been before many courts of last resort, and there is much contrariety of opinion on the subject. We believe the rule to be that one who signs, seals and delivers a deed in which he is not named as grantor is nevertheless bound by these acts as a grantor. We think an examination into the *origin and reason* of the contrary doctrine will demonstrate the correctness of our conclusion. At common law a deed is defined to be a writing, sealed and delivered by the parties. Co. Litt. 171; 2 Bl. Com. 295. Lord Coke said: 'There have been eight formal or orderly parts of a deed of feoffment, *viz.*: (1) The premises of the deed implied by Littleton; (2) the *habendum*, whereof Littleton here speaketh; (3) the *tenendum*, mentioned by Littleton; (4) the *redendum*; (5) the clause of *warrantie*; (6) the *in cuius rei testimonium*, comprehending the sealing; (7) the date of the deed, containing the day, the month, the year and stile of the King, or of the years of our Lord; *lastly*, the clause of *huius testibus*. * * * The office of the premises of the deed is twofold: *First*, rightly to name the feoffor and the feoffee; and, *secondly*, to comprehend the certaintie of the lands or tenements to be conveyed by the feoffment either by expresse words or which may by reference be reduced to a certaintie.' 1 Co. Litt. 6a. Signing was not necessary to make a deed valid as such, at common law, and Sir William Black-

stone says that 'it was held in all our books that sealing alone was sufficient to authenticate a deed; and so the common form of attesting deeds "sealed and delivered" continues to this day; notwithstanding the statute 29, Car. II, chap. 3,' which requires deeds to be signed by the maker. 2 Bl. Com. 307. Not only could any seal be used, but 'a stick or any such like thing which doth make a print.' Shep. Touch. 57. 'In *Temes de la Leys v. "Fait,"*' reference is made to a chapter of Edward III, of which the last two lines run in the English translation thus:

And in witness that it was sooth
He bit the wax with his foretooth.'

—Norton, Deeds, 6.

"*Thus will be seen, from the conditions prevailing at common law, the prime importance of the grantor's name appearing in the body of the deed was to identify the deed as the act of a particular grantor.* Without signature, and executed with a seal intended by the prick of a pin, or imprint of a tooth, the deed could not disclose the identity of the grantor, except by mention of his name in the grant. From the very necessity of the case grew the rule that the name of the grantor should appear in connection with apt words indicating that the deed was his grant. But even at common law a deed could be made in a very informal manner. Says Lord Coke: 'I have tearmed the said parts of the deed formal or orderly parts, for that they be not of the essence of a deed of feoffment; for if such a deed be without premises, *habendum tenendum*, * * * the clause of *in cuius rei testimonium*, the date, and the clause of *hiis testibus*, yet the deed is good. For, if a man by deeds

give lands to another, and to his heirs, without more saying, this is good, if he put his seale to the deeds, deliver it and make livery accordingly.' 1 Co. Litt. 7a. Thus it would seem that the requirement of a deed made before the statute of frauds was, not that the grantor's name should appear in formal context, but, if the writing should identify the grantor, the deed would be considered his grant. Let us also recall the old common law distinction (obsolete in this state) between deeds poll and indentures. The former are those made by one person only. To the latter two or more persons are parties. The case of *Scudamore v. Vandenstene* (1579), cited in 2 Coke's Inst. 673, is grounded upon this principle. It was there held that a person could not take any immediate benefit under an indenture, or sue on any covenant contained therein, unless he was named as a party thereto. The statement of Lord Coke, in that case, that no grant can be made to a person not a party to the deed, was never true except of grants of immediate interest. Norton, Deeds, 24. And was never applied to deeds poll, but was limited to deeds *inter pares*. Norton, Deeds, 24; *Cooker v. Child*, 2 Lev. 74.

"The question first came up in America in the Massachusetts Supreme Court in 1812, in the case of *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56. It was there held that a conveyance by a husband to which the signature and seal of the wife was affixed, but her name not being otherwise mentioned in the deed, did not bar the wife's right of dower. The conclusion of the court was rested on the reason that a deed cannot bind a party sealing it unless it contains

words expressive of an intention to be bound. Other courts have followed the Massachusetts court, either upon the authority of *Catlin v. Ware*, or the reason upon which the decision was placed. *Peabody v. Hewett*, 52 Me. 33, 83 Am. Dec. 486; *Purcell v. Goshorn*, 17 Ohio 105, 49 Am. Dec. 448; *Harrison v. Simons*, 55 Ala. 510; *Stone v. Sledge*, 87 Tex. 49, 47 Am. St. Rep. 65, 26 S. W. 1068; *Adams v. Medsker*, 25 W. Va. 127; *Cox v. Wells*, 7 Blackf. 410, 43 Am. Dec. 98; *Agricultural Bank v. Rice*, 4 How. 225, 11 L. ed. 949. Most of these decisions were based upon the ground that a wife could not relinquish her right of dower unless the conveyance contained apt words expressive of such intent. *But the weakness of the reasoning, in our judgment, is the clinging to an ancient rule of the common law which grew out of the environment and civilization of the sixteenth century, when such conditions do not exist in our own civilization.* As was very pertinently said by WOODBURY, J., in *Elliot v. Sleeper*, 2 N. H. 525, decided as early as 1823; 'Here, however, a deed must, by statute, be attested; and since seals have ceased to be distinguished by peculiar devices, and education has become more generally diffused, signing would seem to be proper and indispensable. When a deed is signed, the utility of naming the grantor in the premises or any part of the body of the instrument appears in a great measure superseded; for "know," says Perkins, Sec. 36, "that the name of the grantor is not put in the deed to any other intent but to make certainty of the grantor." Bacon's Abr. "Brant" C. *This certainty is attained whenever a person signs, seals, acknowledges, and delivers an instrument as his deed, though no mention what-*

ever be made of him in the body of it, because he can perform these acts for no other possible purpose than to make the deed his own. In a deed poll, like that under consideration, where only the grantor speaks or signs or covenants, there is still less danger of mistake and uncertainty concerning the party bound than in deeds indented.' In agreement with the New Hampshire case are *Armstrong v. Stovall*, 26 Miss. 275; *Ingoldsby v. Juan*, 12 Cal. 564, and *Hrouská v. Janke*, 66 Wis. 252, 28 N. W. 166. Text writers now very generally discard as unsound the proposition that the grantor should be named as such in the deed, and approve those cases which hold that the conveyance is operative when signed by the grantor, though his name be omitted from the body of the instrument. 3 Washb. Real Prop. 2120; 1 Devlin, Deeds, Sec. 204.

"The requisites of a deed, under the Code, are that it must be in writing, signed by the maker, attested by at least two witnesses, and delivered to the purchaser, or someone for him, and be made on a valuable or good consideration. No prescribed form is essential to the validity of a deed, and the instrument will be deemed sufficient if it make known the transaction. Civil Code 1895, sections 3599, 3602. We think that the deed under discussion measures up to these statutory essentials, and is effective as a conveyance of the defendant and her co-remainderman, though their names are not mentioned in the body of this instrument. See, in this connection, *Ball v. Wallace*, 32 Ga. 170."

We call especial attention to the following remarks of the Georgia Supreme Court:

“But the weakness of the reasoning, in our judgment, is the clinging to an ancient rule of the common law which grew out of the environment and civilization of the sixteenth century, when such conditions do not exist in our own civilization.”

The Supreme Court of Wisconsin in *Hronska v. Janke*, 66 Wis. 252, 28 N. W. 166, discussed this question and reviewed the authorities and holds that the deed reciting the names of six persons in the body of the deed as grantors, and signed by eight persons, operated to convey the interest and title of all the eight. The court said:

“These cases, so far as we can ascertain the facts upon which they were decided, are distinguishable from the one at bar, and do not rule it. We are disposed to hold that the deed in question was effective as a conveyance of the interest of Henrietta Hover and Martha Hansen, though their names were not mentioned in the body of the instrument. Prof. Washburn says: ‘It was once thought that the grantor should be named in the deed; but this does not seem to be necessary, if the grantor signs it.’ 3 Real Prop. c. 4, Sec. 1, sub. 31.”

See also:

Insurance Co. of Tennessee v. Waller, 116 Tenn. 1, 115 Am. St. Rep. 763;
Hargis v. Ditmore, 7 S. W. 141 (Ky.);
Runyan v. Snyder, 100 Pac. 420 (Col.)

Washburn on Real Property, 6th ed., Vol. 3, section 2120 is as follows:

"Of Grantor's Name in Body of Deed.—It was once thought that the grantor should be named as such in the deed. But this does not seem to be necessary if the grantor signs it. Thus, where a deed purported to be that of a married woman, her name only appearing as grantor, but it was signed by her and her husband, who acknowledged it, it was held to be a good grant of the husband as well as the wife."

THE LEASE IS A CONTRACT.

In *Howard v. Manning*, 79 Okl. 165, 192 Pac. 358, 12 A. L. R. 819, the court said:

"As said by the United States Supreme Court in *United States v. Gratiot*, 14 Peters 526, 528, 10 L. ed. 573, 579; 'The legal understanding of a lease for years is a contract for the possession of land for a determinate period with the recompense of rent.' *Raynolds v. Hanna*, 55 Fed. 783, 800; *Pelton v. Minah Consolidated Mining Co.*, 11 Mont. 283, 28 Pac. 310, 311. Tiedeman on Real Property, section 538, says: 'A lease is a contract between the lessor and lessee, vesting in the latter a right to the possession of the land for a term of years. It becomes an estate when it takes effect in possession'."

That a lease is a contract was again held by the Oklahoma Supreme Court in *Papoose Oil Company v. Swindler*, ... Okl. ..., 221 Pac. 506.

The Oklahoma Supreme Court in *Gilcrease v. McCullough*, 63 Okl. 24, also followed this court's definition of a lease in *United States v. Gratiot*, 14

Peters 526, 10 L. ed. 573, and cited and quoted with approval other authorities to the same effect.

While a lease is a species of conveyance it is not, under modern practice, surrounded by the formalities and solemnities attending the execution of a deed. A lease will be construed by reference to extrinsic evidence for the purpose of ascertaining the meaning of the language used and *what the parties did under the lease*—the practical construction.

—*Lowery v. Westheimer*, 58 Okl. 560, 160 Pac. 496;

Otis v. Pittsburgh-Westmoreland Coal Co., 199 Fed. 87-91;

Old Colonial Trust Co. v. Omaha, 230 U. S. 118;

Grant v. Bannister, 118 Pac. 255;

Yazoo & M. V. R. Co. v. Lakeview Traction Co., 56 So. 395;

Warne v. Sorge, 167 S. W. 969;

Parks v. Baker, 143 Pac. 416;

In re City of Seattle, 100 Pac. 1015;

Bain v. Tye, 169 S. W. 843;

Abadie v. Lee Lumber Co., 55 So. 658;

Warvelle on Vendors, Vol. 1, pages 361-365.

Oklahoma, following the trend of modern authority has adopted the liberal rule of construction for deeds. In *Smart v. Bassler*, ... Okl. ..., 223 Pac. 352, the court said:

“In earlier decisions much importance was attached to the language used in the different

clauses of a deed, but the modern tendency is to ignore the technical distinctions between the various clauses and to ascertain, if possible, the intention of the grantor from the entire instrument without undue preference to any part."

Likewise, see, *Palmer Oil & Gas Co. v. Blodgett*, 60 Kans. 712, 57 Pac. 947.

EXTRINSIC CIRCUMSTANCES.

Schulte v. Schering, 2 Wash. 127, 26 Pac. 78, sustains the proposition that the omission from the granting clause of a lease of the name of one of the lessors is regarded as immaterial where the lessee has entered, paid rent and made improvements, and that fits the facts in this case exactly.

Appellant's counsel do not dissent from the following finding of fact made by the trial judge (Rec., p. 69), to-wit:

"I find that at the time the lease was executed by J. J. Eaves as curator of the Allie Daney estate he was then and there the regular guardian of her estate, and that when he joined in the A. N. Thomas lease, *having first been specifically authorized to that end by the County or Probate Court of Love County*, he was then and there the regular guardian of her estate and that when he acted in joining in the lease by executing it, Mr. Dana H. Kelsey, the Superintendent of the Five Civilized Tribes and representative of the Secretary of the Interior as to the initiation of such matters, that the same was done at his suggestion and that when J. J. Eaves as curator acted in joining in

the execution of said lease and same was approved by the County or Probate Court of Love County, that this was done at the suggestion of said Dana H. Kelsey, Superintendent of the Five Civilized Tribes, and representative of the Secretary of the Interior; that by the act of the said J. J. Eaves as curator, and the authorization and approval of the County or Probate Court of Love County, placed the oil and gas legal title in Dunn and Gillam to be transferred to the Bull Head Oil Company subject to the approval of the lease by the Secretary of the Interior, and afterwards the bonus fixed by the Secretary of the Interior through the Superintendent of the Five Civilized Tribes, to-wit: two thousand dollars was paid and said lease approved by the Secretary of the Interior.”

Neither do appellant's counsel dissent from the following finding incorporated in the trial court's decree (Rec., p. 77), to-wit:

“(5) The court further finds that when J. J. Eaves, curator of the estate of Allie Daney, on or about the 26th day of January, 1914, subscribed his name to the oil and gas lease of date of August 19, 1913, by A. N. Thomas as guardian of Allie Daney to J. Robert Gillam and T. H. Dunn, said Eaves subscribed his name as curator, *it being the intention that said Eaves should so execute said lease*, in joining therein, as to execute a valid oil and gas lease and that was the then present intention on the part and so understood and that in so executing it, after it was approved by the County Court of Love County and by the Secretary of the

Interior, would operate to make said oil and gas lease a binding lease on the estate of Allie Daney, and that the execution by said J. J. Eaves, as curator and approval by the County Court of Love County, and by the Secretary of the Interior was free from fraud and the same operated to make said lease a valid lease, said lease being for a term of ten (10) years from the date of the approval by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities, and covering the following described land, to-wit: (describing the 40 acres)."

The circumstances under which the lease was executed by Eaves, are conclusive that Eaves and all parties intended that Eaves should be the lessor, if as a matter of law, he was the legal guardian. That is clearly indicated from the face of the lease as well as conclusively shown by the circumstances. The lease as executed by Eaves was approved by the Secretary of the Interior and the assignment thereof to the Bull Head Oil Company likewise approved by the Secretary, all in accordance with the plan suggested by Mr. Kelsey, Indian Superintendent. Under these circumstances it would be utterly absurd to strike down this lease on the ground that Eaves was not a party thereto. The rule announced by the Third Circuit Court of Appeals in *Otis v. Pittsburgh-Westmoreland Coal Co.*, 199 Fed. 87-91, is exactly in point. The court said:

“When in the performance of a written contract both parties give it a practical con-

struction, before any controversy has arisen in regard thereto, such construction, rather than its literal meaning, will prevail; for, as Lord Chancellor Sudgen, in *Attorney General v. Drummond*, 1 Dru. & Wal. 353, 366, affirmed 2 H. L. Cas. 837, said: 'Tell me what you have done under a deed, and I will tell you what that deed means.' Unless the language is so clear as to admit of no reasonable controversy as to its meaning, the court is not likely to go astray if it enforces that construction which the parties, without coercion, have themselves acted upon. *District of Columbia v. Gallaher*, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. ed. 526; *Lowrey v. Hawaii*, 206 U. S. 206, 222, 27 Sup. Ct. 622, 51 L. ed. 1026; *Davis v. Alpha Portland Cement Co.*, 142 Fed. 74, 76, 73 C. C. A. 388; *Chicago, G. W. Ry. Co. v. Northern Pacific Ry. Co.*, 101 Fed. 792, 795, 42 C. C. A. 25; *Manhattan Life Ins. Co. v. Wright*, 126 Fed. 82, 87, 61 C. C. A. 138; *Central Trust Co. of N. Y. v. Wabash, St. L. & P. Ry. Co.*, (C. C.) 34 Fed. 254."

See page 75 of this brief wherein we quote from the Oklahoma Supreme Court's opinion in *Lowrey v. Westheimer*, 58 Okl. 560, 160 Pac. 496.

POINT FIVE.

As said by Lord Camden in *Smith v. Clay*, 3 Brown Ch. 646, "Nothing can call forth this court into activity but conscience, good faith and reasonable diligence," and under that rule the United States cannot in good faith and with clean hands now be heard to insist that Eaves' execution of the

lease was a nullity because his name failed to appear in the granting and demising clause.

It must be remembered that Mullen surrendered the lease executed to him by Eaves as curator on August 18, 1913, in consummation of a compromise agreement suggested, and we might say coerced, by the Indian Superintendent. It was the Indian Superintendent who suggested that either Thomas join in the Eaves lease or Eaves join in the Thomas lease. As a matter of expediency it was decided to have Eaves execute the Thomas lease because Mullen's lease from Eaves not only covered the 40 acres involved but 90 acres additional. Mullen was not to surrender his lease from Eaves insofar as it covered the other 90 acres of Allie Daney's land. The Bull Head Oil Company became the assignee of this lease and the owner thereof and therefore the only party entitled to have it reformed. The Court of Appeals inadvertently stated in its opinion (last paragraph, Rec., p. 264) that "there were no pleadings by any of the defendants asking the court to reform the lease in that respect, but at the time the court announced its conclusion and directed that the complaint be dismissed, the defendants in open court moved for reformation and correction, which was denied, and from that the defendants took a cross-appeal." In this the Court of Appeals was inadvertently in error because the defendant, Bull Head Oil Company, had long prior to a decision in the case amended its answer and cross bill so as to ask for

reformation. The final decree of the trial court (Rec., p. 75) shows that the case was heard at the October, 1919, term at Ardmore, and taken "under advisement until the . . . day of October, 1920, . . . whereupon the court filed a memorandum opinion finding the issues in favor of defendants and cross plaintiffs and against the plaintiff," etc. This memorandum opinion of the trial judge was filed on October 27, 1920 (Rec., p. 70). Prior thereto and on the 26th day of April, 1920, the defendants, Bull Head Oil Company, Mullen, Dunlap, Hamon, Russell and Adams moved the court for leave to amend their joint and separate answers so as to add thereto paragraph No. 6. Paragraph No. 6 is contained in the order of the court made and entered on April 26, 1920 (Rec., p. 64). This amendment avers the execution of the lease by Eaves and that it was the intention of all parties that he should be the lessor therein; avers that by mutual mistake Eaves' name was omitted from the granting clause, etc., and then prays for a decree of reformation "so as to incorporate in the body thereof the name 'J. J. Eaves, curator of Allie Daney, a minor,'" etc. (Rec., p. 65). Thereafter and on December 7th, 1920, appellant's counsel filed a motion for additional findings of fact (Rec., p. 70) and thereafter and on the 7th day of June, 1921, the court rendered its decree (Rec., pp. 75-79). On December 2, 1921, the defendants, Bull Head Oil Company, Mullen, Adams, Ketch as administrator of Jake L. Hamon, McCain, Russell, Dol-

man, Dunlap, and defendants T. H. and N. E. Dunn and J. Robert Gillam and wife, prayed and obtained an appeal to the Eighth Circuit Court of Appeals and filed their assignments of error to the effect that the trial court was in error in not reforming the lease so as to incorporate in the granting clause thereof the name of J. J. Eaves, as curator, etc. Thereafter and on August 22, 1921, the Bull Head Oil Company submitted to the Attorney General of the United States an offer to compromise. This offer was embodied in a letter and subsequently a compromise contract was drafted and executed September 6, 1921, and approved by the Assistant Secretary of the Interior on October 15, 1921, and by W. T. Riter for the Attorney General on September 22, 1921 (Rec., pp. 256-258). Under this compromise agreement the Bull Head Oil Company paid to the Indian Superintendent \$45,000.00 and to W. A. Ledbetter, Special Assistant Attorney General a fee of \$12,500.00.

The opinion of the court of appeals was filed on March 28, 1923, and judgment of that court entered on the same date. Appellant waited until almost the end of the three months' time allowed by law to appeal and then on June 23, 1923, prayed and obtained an appeal to this court (Rec., p. 267). The assignment of errors was filed in the court of appeals on June 25, 1923, but the citation was not served on any of the defendants until after the three months' time had expired within which to appeal. *The Bull*

Head Oil Company had compromised the case and was out of it. The title to the lease, both legal and equitable, was in the Bull Head Oil Company, and not in its stockholders and this being true its stockholders could not appeal from the judgment of the court of appeals. But if they could have appealed the Government very carefully delayed its appeal until just before the expiration of the three months allowed by law and did not give any notice to the defendants until after the three months had expired. Under these circumstances the defendants could not file a cross appeal. Certainly when the Government compromised the case with the Bull Head Oil Company, assignee of the lease, and thereby eliminated the Bull Head Oil Company as a party, it is extremely inequitable on the part of the Government to now insist that Eaves' execution of the lease was a nullity. That contention does not come with very good grace and ought to be ignored. It smacks too much of whipsawing Dunn and Gilham.

ESTOPPEL.

Defendants are not estopped to deny the authority of Atha N. Thomas to act as guardian of Allie Daney.

Appellant in its brief, page 65, relies upon section 5247, Oklahoma Comp. Laws, 1921, declaring that "Any person or corporation having knowingly received and accepted the benefits or any part there-

of of any conveyance, mortgage or contract relating to real estate, shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud." This lease was executed by Thomas and by Eaves and accepted by the Indian Superintendent and recommended by him to the Secretary for approval and approved by the Secretary with the definite understanding that either Thomas or Eaves was the legal guardian and the other not. That was left open for judicial determination when required. The compromise agreement shows that on its face. That is supported by the testimony of Kelsey, the Indian Superintendent, in his letters and reports to the Indian Commissioner and the Secretary. Dunlap testifies (Rec., p. 164):

"At the time this contest was pending before the Department at Muskogee in Mr. Kelsey's office and as a part of the compromise arrangement, it was understood that the conflicting guardianships were to be extinguished, and following up the agreement Eaves filed his report and was discharged as curator in Love County—Eaves resigned."

Section 5247, Oklahoma Comp. Laws, 1921, has no application to this case. It applies to the relation between principal and agent and contracts made by the principal for himself and accepts benefits thereunder. Where the principal receives and

accepts benefits under the conveyance, mortgage or contract, he is estopped to deny the authority of the agent. Appellant's position would lead to this absurd situation: (1) Thomas having executed the lease as guardian the lessees are estopped to deny Thomas was guardian; and (2) Eaves having executed the lease as guardian the lessees are likewise estopped to deny his authority. There can be no such repugnant estoppel as that.

Injury is a necessary element of a valid estoppel and neither the appellant nor its ward, Allie Daney, is injured by showing that Thomas had no authority, nor is the lessee injured.

4 Am. & Eng. Dec. in Eq., page 289, citing a great many authorities, lays down the following rule:

“The last requisite of a valid estoppel is, that the party who claims it must either have been injured by the course he has adopted in reliance upon the representations or conduct of the other, or that he has been induced to change his position, or incur liability to such an extent that it would be inequitable to allow the latter to allege a state of facts contrary to that in which he has led the former to believe; and if there has been no substantial *injury* or change of position, the estoppel is not made out.”

21 C. J., page 1135, says:

“In order to create an estoppel *in pais* the party pleading it must have been misled to his *injury*; that is, he must have suffered a loss of a substantial character or have been induced

to alter his position for the worse in some material respect. As otherwise expressed, where no available right is parted with and no injury suffered there can be no estoppel *in pais*. And *a fortiori*, an act clearly beneficial to the person setting up the estoppel cannot be relied on. In the absence of injury, it is of course immaterial that the other elements of estoppel are present."

Atha N. Thomas, as Guardian.

We will now discuss the case on the assumption Atha N. Thomas was the legal guardian and that Eaves was not. This brings on for consideration our 7th, 8th, 9th, 10 and 11th points of law, which are as follows:

(7) That upon the discovery of the alleged fraud the United States had one of two remedies, *to-wit*: (a) An action in equity for rescission, cancellation and accounting, in which it would be necessary to offer to do equity by restoring to defendants the consideration paid, etc.; or (b) an action for damages to recover the value of the lease at the time it was fraudulently obtained.

(8) That the plaintiff cannot have both of these remedies and was required to elect which remedy it would pursue, and having elected to pursue the remedy in equity for rescission, it is bound thereby.

(9) That having elected to sue in equity for the rescission and cancellation of the lease, the compromise with the Bull Head Oil Company, the assignee

and owner of the lease, condoned all fraud and extinguished the cause of action in its entirety, without regard to the doctrine of joint tort feasors and therefore left the Government with no cause of action for damages against Dunn or any of the other parties.

(10) That by the compromise of this case while pending in the Court of Appeals the appellant lost all equities in that it appears from the evidence that the compromise was a collusive arrangement between the Bull Head Oil Company and certain of its stockholders whereby certain stockholders, with the consent and approval of the appellant, received preferential advantages out of the funds and assets of the corporation in which appellees, Dunn and wife, were not allowed to participate.

(11) That if the compromise with the Bull Head Oil Company, the assignee and owner of the lease, did not enure to the benefit of Dunn and Gillam as stockholders, the measure of any recovery against Dunn and Gillam is the value of the lease at the time it was executed on August 18, 1913, and full value having been paid to the Indian Superintendent and received by the Indians, there is nothing to recover in this suit.

PRELIMINARY POINT.

The appellant was guardian of Allie Daney, the full-blood Indian, and had full power to compromise this case, especially with the approval of the Court of Appeals, which was given.

In *Tiger v. Western Investment Company*, 221 U. S. 286, this court denominated the relationship between the United States and the full-blood Indian as that of guardianship and ward, and said that "it rests with Congress to determine when its guardianship shall cease."

In *United States v. Kagama*, 118 U. S. 375-384, this court said: "These Indian tribes are the wards of the Nation." Not only is the United States guardian of the tribe, but is likewise guardian of the restricted full-blood Indian.

—*Heckman v. United States*, 224 U. S. 413;
Goat v. United States, 224 U. S. 459;
Privett v. United States, 256 U. S. 201;
Bowling v. United States, 233 U. S. 528-535;
United States v. Bowling, 256 U. S. 484;
Brader v. James, 246 U. S. 88.

As the guardian of the Indian the appellant has plenary control over the litigation, its representation of the Indian being complete in every essential and recognizing "no limitations that are inconsistent with the discharge of the national duty."

Thus in *Heckman v. United States*, 224 U. S. 444, this court said:

“The argument necessarily proceeds upon the assumption that the representation of these Indians by the United States is of an incomplete or inadequate character; that although the United States, by virtue of the guardianship it has retained, is prosecuting this suit for the purpose of enforcing the restrictions Congress has imposed, and of thus securing possession to the Indians, their presence as parties to the suit is essential to their protection. This position is wholly untenable. There can be *no more complete representation than that on the part of the* United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tute-lage. Its efficacy does not depend upon the Indian’s acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it *recognizes no limitations that are inconsistent with the discharge of the national duty.*

“When the United States instituted this suit, it undertook to represent, and did represent, the Indian grantors whose conveyances it sought to cancel. *It was not necessary to make these grantors parties*, for the Government was in court on their behalf. Their presence as parties could *not add to, or detract from*, the effect of the proceedings to determine the violation of the restrictions and the consequent invalidity of the conveyances. As by the Act of Congress

they were precluded from alienating their lands, they were likewise precluded from taking any position in the legal proceedings instituted by the Government to enforce the restrictions which would render such proceedings ineffectual or give support to the prohibited acts. The cause could not be dismissed upon their consent; they could not compromise it; nor could they assume any attitude with respect to their interest which would derogate from *its complete representation* by the United States. This is involved necessarily in the conclusion that the United States is entitled to sue, and in the nature and purpose of the suit.” (Italics ours.)

The appellant, being vested with complete authority to institute the suit and control the litigation, has the concomitant power to compromise the case.

—*Thompson v. Maxwell Land Grant & Railway Co.*, 168 U. S. 451;
Gusdofer v. Gundy, (Miss.) 16 So. 432;
Cannon v. Hemphill, 7 Tex. 184;
Gunter v. Fox, 51 Tex. 383;
Hollis v. Dashiell, 52 Tex. 187;
Vedrine v. Cosden & Co., (Okl.) 220 Pac. 329.

This brings us to a discussion of our conclusions of law, 7 to 11, inclusive, above set out.

SEVENTH CONCLUSION OF LAW.

That upon the discovery of the alleged fraud the United States had one of two remedies, to-wit:

(a) An action in equity for rescission, cancellation and accounting, in which it would be necessary to offer to do equity by restoring to defendants the consideration paid, etc., or (b) an action for damages to recover the value of the lease at the time it was fraudulently obtained.

This point will not be disputed.

Black on Rescission and Cancellation, Vol. 2, section 561, says:

“A contract induced by fraud, false representations, deceit, mistake, duress, or undue influence, or, generally, which is rescindable for any legally sufficient cause, is not, as a rule, void, but is only voidable. If the injured party chooses to abide by it, there is nothing to prevent him from doing so, and in that case the other party will be legally bound to fulfill the contract. On the other hand, if the injured party chooses to rescind the contract, he has the right to do so, and the contract will be thereby *abrogated for all purposes. He is therefore put to his election either to rescind the contract or to affirm it.*”

EIGHTH CONCLUSION OF LAW.

That the plaintiff can not have both of these remedies and was required to elect which remedy it would pursue, and having elected to pursue the remedy in equity for rescission, it is bound thereby.

This will hardly be disputed.

Black on Rescission and Cancellation, Vol. 2, section 561, says:

"But a person who is in a position where he can either affirm or rescind a contract *cannot do both*. He cannot treat the contract as rescinded for the purpose of escaping obligations under it, and at the same time treat it as subsisting for the purpose of claiming benefits, or for any reason treat it as *abrogated and as existing at the same time*. Thus, a complainant in equity *cannot, by his bill, attack an instrument as fraudulent and void for any reason, and at the same time assert rights under it if the court should hold it valid, but he must elect whether to claim under or against the instrument before bringing his suit.*"

The same authority, section 562, says:

"When a person is entitled either to rescind a contract for fraud or other cause or to affirm it and seek compensation for the injury it may have done him, his adoption of either remedy *will preclude all recourse to the other.*"

The same authority, section 563, says:

"A person who has the right either to rescind a contract to which he is a party or to affirm it and seek compensation in other ways for any injury he has suffered, and who has once made his election and announced it, *must abide by his choice*. He cannot be allowed to vacillate in his purpose or, having chosen one remedy, to abandon it and seek the other. * * * So, a party who has been led into a transaction by means of fraud may elect, if he so chooses, after acquiring full knowledge of the fraud, to affirm the contract, and after such election is once deliberately made, with full knowledge of the

facts he will not be allowed to shift his position and seek a rescission."

This court, in *Shappirio v. Goldberg*, 192 U. S. 232, 48 L. ed. 419, said:

"It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must, upon the discovery of the fraud, announce his purpose and *adhere to it.*"

The Government's bill is for cancellation and rescission and not for damages. The Government's bill nowhere affirms the lease, but seeks to have it rescinded and cancelled and alleges specifically (see paragraph 10, Rec., p. 9) "*that said corporation at all times had full notice and knowledge of the secret agreement entered into and the secret interest held and owned by the parties aforesaid in said lease as charged in paragraph No. VI-d hereof.*" The bill charges in the last sentence of the 12th paragraph (Rec., p. 14) that Adams, Mullen, Gillam and wife, and others "*received large sums of money therefrom either in the form of dividends paid by the corporation or in the form of proceeds of the sale of said stock to others, or both; that all such moneys were received by each and all of the defendants with full knowledge of the fraudulent character of the lease held by the Bull Head Oil Company,*" etc. The 10th paragraph of the bill (Rec., p. 9) alleges that Dunn and Gillam caused the Bull Head Oil Company to be organized and that Dunn, Gillam, Dolman, Dunlap and

Mullen, incorporators and directors, "each and all were at the time of the organization of said corporation fully aware of said secret agreement set forth in paragraph VI-d hereof, and were informed of all the facts and circumstances connected therewith." The 12th paragraph of the appellant's bill (1st sentence, Rec., p. 12) alleges that Mullen paid nothing for his 8,000 shares in the Bull Head issued to him for the benefit of himself and associates and that "he took same with full knowledge of the Funkhouser agreement shown in paragraph VI-d and with full knowledge of the deception practiced and perpetrated upon Superintendent Kelsay and upon the Secretary of the Interior, as alleged in paragraph VIII, and that his associates Jake L. Hamon, Errett Dunlap and F. N. Adams accepted and received their portion of said capital stock with full knowledge of said Funkhouser agreement and of the deception practiced and perpetrated upon said federal officials; wherefore, plaintiff alleges that the issuance of said stock and the transfer thereof was wholly illegal and void." So an examination of appellant's bill shows that this is a suit to rescind and cancel the lease and for a full accounting against the Bull Head and all of its stockholders for all the money received by them from the oil taken from the land, etc.

The 3rd paragraph of the prayer is for a decree that the defendants and each of them be decreed to have no right, title and interest in said land, or any

part thereof; the 4th paragraph prays for a judgment requiring the Bull Head Oil Company, Dunn and wife, Russell, Gillam and wife, Dolman, Dunlap, Hamon, McCain, Mullen and Adams to account for all oil and gas taken from said land and for the money received by them as the proceeds of said oil and gas taken from said land.

The 5th paragraph of the prayer is as follows:

“That if for any reason the court shall hold that the lease described in paragraph V and shown in ‘Exhibit A’ cannot be cancelled, then plaintiff prays that the defendant stockholders be adjudged the holders of said stock respectively in trust for said Allie Daney, and that Allie Daney be declared the rightful owner thereof and that plaintiff be awarded the custody thereof for her use and benefit; that the defendant, the Bull Head Oil Company, be required to account for all the oil and gas taken from the said premises and for the proceeds thereof; and that the defendants who are or at any time have been stockholders of the Bull Head Oil Company be required to account for all moneys received by them respectively, either as dividends or as proceeds of sales of their stock.”

The answer to this prayer is that the appellant cannot disaffirm and affirm the lease in the same suit. *To render a decree for all the stock or any part thereof belonging to any defendant stockholder is an affirmation of the lease.*

The above quoted 5th paragraph of the prayer seems to be based on an imaginary power of the court to do a thing indirectly that it possibly could not or would not do directly. Thus the court is asked to award a judgment against all the stockholders for the stock and an accounting against them and the Bull Head for oil and gas in the event "for any reason the court shall hold that the lease described in paragraph V and shown in 'Exhibit A' cannot be cancelled." Just why the court could give a judgment against all the stockholders for their stock, coupled with a judgment against the Bull Head and the stockholders for an accounting *and leave the lease in force, is a puzzle.* The point is that this is a suit to rescind and cancel the lease and for an accounting.

The bill does not allege that the Bull Head was a bona fide purchaser and therefore rescission and cancellation being impossible the plaintiff was entitled to damages or an accounting against the stockholders. Quite to the contrary because, as pointed out, the bill alleges specifically that the Bull Head and all the stockholders had full knowledge and notice of the alleged fraud. When the Government commenced this suit as a suit to cancel it is bound by its election and cannot have a judgment for damages or a judgment for the stock of any particular stockholder.

—*Wilson v. New United States Cattle-Ranch Co., 73 Fed. 994;*

Shappirio v. Goldberg, 192 U. S. 232, 48
L. ed. 419;

Supreme Council, etc., v. Lippincott, 134
Fed. 824.

The appellant, with or without the written consent of some of the parties, can not change its action in the Court of Appeals—change its base—so as to ask for another and different relief against some of the parties not joining in the compromise. Although no judgment for damages is asked in the bill the compromise stipulation, paragraph 2 (Rec., p. 256), requires the appellant to waive all relief against the Bull Head and all the other stockholders except the Dunns and Gillams. By this provision in the compromise agreement it is expressly recited that the Government “will neither ask nor insist upon a reversal of said cause or a recovery against the Bull Head Oil Company or against any of the defendants in said cause, save and except T. H. Dunn, N. E. Dunn, J. Robert Gillam and Mrs. J. Robert Gillam, and that it will not insist upon any judgment impressing a trust upon any of the stock in Bull Head Oil Company heretofore owned by J. Robert Gillam or Mrs. J. Robert Gillam and assigned to Jake L. Hamon, but will insist upon a money judgment against them for whatever amount the testimony may show should be awarded.” An amendment in the trial court asking for the relief the Government agrees now to ask for under the compromise agreement would have been denied.

Thus in *Shields v. Barrow*, 17 How. 130-146, 15 L. ed. 158, this court said "A bill may be originally framed with a double aspect, or may be so amended as to be of that character, but the alternative case stated must be the foundation for *precisely the same relief*," etc. This court further said, in the same case, "Nor is a complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment."

NINTH CONCLUSION OF LAW.

That having elected to sue in equity for the re-scission and cancellation of the lease, the compromise with the Bull Head Oil Company, the assignee and owner of the lease, condoned all fraud and extinguished the cause of action in its entirety, without regard to the doctrine of joint tort feasors and therefore left the Government with no cause of action for damages or other relief against Dunn or any of the other parties.

After this case was appealed to the court of Appeals a compromise was entered into on the 6th day of September, 1921, between the Bull Head Oil Company and the United States whereby the Bull Head agreed to and did pay in installments to the Indian Superintendent for the benefit of Allie Daney the sum of \$45,000.00, and also pay Mr. Ledbetter, Assistant to the Attorney General, a fee of \$12,500.00. We are not here concerned with the law applicable

to a settlement and compromise effected with one joint tort feasor. Under the allegations of the appellant's bill the Bull Head Oil Company and all the officers and stockholders were joint tort feasors, but the trial court found that the Bull Head Oil Company and Mullen and his associates were bona fide purchasers.

This is not an action for damages for a joint wrong or tort, but a suit in equity to rescind and cancel a lease on the ground of fraud. Appellant had the right to elect whether it would rescind, or affirm the lease and sue for damages. The Government elected to disaffirm the lease and brought this action but after the case was appealed to the Circuit Court of Appeals the Government reversed its position and affirmed the lease. When the Government compromised this case it completely and irrevocably affirmed the lease—ratified it, and that ratification and affirmation relates back to the date of the lease and cures every defect therein.

Appellant can not affirm in part and disaffirm in part. The lease is an entirety and can not be rescinded as to a part of the parties and affirmed as to others. The lease being an entirety can not be split up by various suits to cancel against various interested defendants. While an injured party may sue ONE or ALL the joint tort feasors for damages, there can be only one suit to cancel a lease, and the compromise and settlement of the suit is an affirmation

and ratification of the lease as an entirety and terminates the cause of action against everyone. Thus, in Shields v. Barrow, 17 How. 130-146, 15 L. ed. 158, the court had under consideration a suit to rescind a compromise agreement and said, "The contract of compromise was one entire subject, and from its nature could not be rescinded, so far as respected two of the parties to it, and allowed to stand as to the others."

Thus Story's Equity Juris., 14th ed., Vol. 1, section 291, says:

“In the next place the defrauded party may, by his subsequent acts with full knowledge of the fraud, deprive himself of all right to relief as well in equity as at law. Thus for example, if with full knowledge of the fraud he should settle the matter in relation to which the fraud was committed, and give a release to the party who has defrauded him, he would lose all title to legal and equitable relief. The like rule would apply if he knew all the facts, and with such full information continued to deal with the party.

“(If one become advised of the fraud perpetrated upon him in season to recede from his engagement, and yet, with knowledge of the falsity of the representations which had induced the contract, elects to perform, and clearly manifests his intention to abide by the contract, *he condones the fraud and is without a remedy*. The contract, being against conscience because of the fraud, is not obligatory upon him, if he shall so elect; but if, when fully in-

formed of the fraud, he voluntarily confirms, ratifies and performs and exacts performance of the contract, he *condones the fraud, and such ratification, like the ratification of the unauthorized act of an agent, relates to the time of the contract, confirming it from its date and purging it of fraud.)*" (Italics ours.)

If with knowledge of the fraud the party exacts performance or performs himself he condones the fraud.

—*McLean v. Clapp*, 141 U. S. 429;

Grymes v. Sanders, 93 U. S. 55;

Burk v. Johnson, 146 Fed. 209;

Kingman v. Stoddard, 85 Fed. 740;

Simon v. Goodyear Metallic Rubber Shoe Co., 105 Fed. 574.

As said in *Grymes v. Sanders, supra*, a party "is not permitted to play fast and loose." The appellant made its election when it commenced its suit in the District Court and *not when it appealed the case to the Court of Appeals*. A plaintiff need not receive any consideration for making the election —he simply has a choice of remedies and in this case appellant elected rescission. Now after the case got into the Court of Appeals the appellant elects to affirm, but this second election is supported by a consideration, to-wit, \$45,000.00, plus \$12,500.00 to appellant's attorney. This second election to affirm the lease purged the transaction of all fraud. The \$45,000.00 and attorney fee was not paid as part satis-

faction for unliquidated damages, *but paid for the consummation and ratification of an alleged fraudulent lease, and that lease can not be affirmed and ratified in part and disaffirmed in part.* See 21 Corpus Juris, Sec. 209, page 1208.

TENTH CONCLUSION OF LAW.

That by the compromise of this case while pending in the Court of Appeals the appellant lost all equities in that it appears from the evidence that the compromise was a collusive arrangement between the Bull Head Oil Company and certain of its stockholders whereby certain stockholders, with the consent and approval of the appellant, received preferential advantages out of the funds and assets of the corporation in which appellees, Dunn and wife, also stockholders, were not allowed to participate.

As above pointed out, the 10th paragraph of the bill (Rec., p. 9), alleges that the Bull Head "at all times had full notice and knowledge of the secret agreement entered into and the secret interest held and owned by the parties aforesaid in said lease as charged in paragraph No. VI-d hereof," and that Dunn, Gillam, Dolman, Dunlap and Mullen, "the incorporators and directors thereof, * * * each and all were at the time of the organization of said corporation fully aware of said secret agreement set forth in paragraph No. VI-d hereof, and were informed of all the facts and circumstances connected there-

with." The appellant's bill (Rec., p. 12, 1st sentence) not only alleges that Mullen and his associates paid nothing for their 8,000 shares, but "took same with full knowledge of the Funkhouser agreement shown in paragraph VI-d, and with full knowledge of the deception practiced and perpetrated upon Superintendent Kelsey and the Secretary of the Interior, as alleged in paragraph VIII, and that his associates, *Jake L. Hamon, Errett Dunlap and F. N. Adams*, accepted and received their portion of said capital stock *with full knowledge* of said Funkhouser agreement and of the deception practiced and perpetrated upon said Federal officials," etc. The fourth paragraph of the prayer (Rec., p. 15) prays for judgment against the Bull Head, Dunn and wife, Gillam and wife, Russell, Dolman, Dunlap, Jake L. Hamon, McCain, Mullen and Adams, for an accounting for all oil and gas taken from the said land and the money received by them as the proceeds thereof.

On April 18, 1918, defendant, Jake L. Hamon, purchased the stock of Gillam and wife for a consideration of \$75,000.00, part in cash and part in notes which were subsequently paid by Hamon (Rec., p. 146). But the compromise the Bull Head effected with the United States *was not made on behalf of itself and all of its stockholding defendants, but only on behalf of itself and a part of the stockholders* (Rec., p. 256). This compromise agreement seems to have originated with the Bull Head Oil Company,

as shown by a letter of August 22nd, 1921, dated Washington, D. C., addressed to the Attorney General of the United States (Rec., p. 256). This letter begins: "Sir: Referring to the conferences which have taken place between the Bull Head Oil Company and *its attorneys* and the Department of Justice with reference to the settlement of certain matters involved in the above case, the Bull Head Oil Company makes the following proposition:"

(*Note: This refers to a conference between the Bull Head and *its attorneys* and the Department of Justice. We take occasion here to say that neither Geo. S. Ramsey, nor his partners, Edgar A. deMeules and Villard Martin, counsel for the Bull Head in this case in the District Court, advised said compromise or had any notice or knowledge thereof until after it had been effected. The compromise having been effected their services were no longer needed by the Bull Head and Mr. Ramsey and his partners accepted employment by Dunn and wife to represent them in the Court of Appeals and in this court.*

The Bull Head's proposition submitted to the Department of Justice on August 22, 1921, for a settlement expressly recites in paragraph 2 thereof that "This proposition is made with the understanding that in any appeal which the United States may prosecute from the decision of United States Court for the Eastern District of Oklahoma in the above filed cause to the United States Circuit Court of Appeals or to the Supreme Court of the United

States, the United States will neither ask nor insist upon a reversal of said cause or a recovery against the Bull Head Oil Company or *against any of the defendants* in said cause, save and except T. H. Dunn, N. E. Dunn, J. Robert Gillam, and Mrs. J. Robert Gillam, and that it will not insist upon any judgment impressing a trust upon *any of the stock in Bull Head Oil Company* heretofore owned by J. Robert Gillam or Mrs. J. Robert Gillam and *assigned to Jake L. Hamon*, but will insist upon a money judgment against them for whatever amount the testimony may show should be awarded." *The Bull Head had the right and power to compromise the case for itself but no right to compromise it for itself and a part of its stockholders jointly sued with Dunn and Gillam, other stockholders.* That would be equivalent to a distribution of a part of the corporate assets to a part of the stockholders. Hamon had purchased the Gillam stock. Appellant sued him claiming he was not a bona fide purchaser and alleged that all the other stockholders were bad faith purchasers and asked for a judgment against all the stockholders. The compromise agreement requires the Government to abandon all claims against Hamon and the stock he purchased from the Gillams and in lieu thereof "insist upon a money judgment against them (the Gillams) for whatever amount the testimony may show should be awarded." *The Dunns are stockholders.* The expenditure of \$57,500.00 to settle this case was a misappropriation of

corporate funds because it undertakes to settle for the company and part of its stockholders, excluding the other stockholders, the Dunns, from in any way sharing in the benefits of said appropriation. That is clearly an illegal diversion of corporate funds and a fraud on the Dunns. The Government certainly was advised of this condition as it openly entered into the contract of settlement. The compromise was unconscionable in that it amounted to a misappropriation of corporate funds—a preferential appropriation—an appropriation for the special benefit of part of the stockholders to the exclusion of other stockholders. That was a fraud. Although the authorities hold that the title of the corporation to its property is separate and distinct from the property of the stockholders, nevertheless, the stockholders are the ultimate owners of the corporation. On a dissolution they are entitled to everything above the debts. They are entitled to receive the dividends per share equally. The Bull Head could no more make this compromise and exclude a part of the defendant stockholders therefrom than it could declare a dividend to part of the stockholders to the exclusion of the Dunns. That is just common justice.

The compromise was in violation of section 5461, Oklahoma Compiled Laws of 1921, section 1360, R. L. 1910. That section prohibits mining and manufacturing corporations organized under the laws of

Oklahoma from appropriating its funds to any other purpose than that distinctly and definitely specified in the articles of incorporation, and prohibits the loaning of corporate funds to stockholders. This was more than a loan—it was a gift of corporate funds to certain favored stockholders.

The appellant, by entering into the compromise contract with the Bull Head whereby the corporate funds were to be used for the special benefit of a part of the stockholders to the exclusion of other stockholders, made itself a party to the fraud and cannot, with good grace, further prosecute this action by law or otherwise. The Government does not come into this court with clean hands.

Appropriate to this situation are the remarks of Judge SANBORN, speaking for the Eighth Circuit Court of Appeals, in *State of Iowa v. Carr*, 191 Fed. 257-266, to-wit:

“But the great weight of authority, the stronger reasons and the settled rule upon this subject in the courts of the United States, is that, while mere delay does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet, when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances.

“The equitable claims of a state or of the United States appeal to the conscience of a

chancellor with the same, but with no greater or less force than would those of an individual under like circumstances. *United States v. Stinson*, 197 U. S. 200, 204, 205, 25 Sup. Ct. 426, 49 L. ed. 724; *United States v. Detroit Timber & Lumber Co.*, 67 C. C. A. 1, 10, 131 Fed. 668, 677; *United States v. Chicago, M. & St. P. Ry. Co.*, (C. C.) 172 Fed. 271, 276; *United States v. Chandler-Dunbar Water Power Co.*, 152 Fed. 25, 26, 27, 37, 38, 40, 41, 81 C. C. A. 221, 222, 223, 233, 234, 236, 237; *United States v. Stinson*, 125 Fed. 907, 910, 60 C. C. A. 615, 616; Herman on Estoppel, sections 676, 677; *State of Michigan v. Jackson, L. & S. R. Co.*, 16 C. C. A. 345, 351, 69 Fed. 116, 122; *State v. Flint & P. M. R. Co.*, 89 Mich. 481, 51 N. W. 103, 106; *United States v. California & Oregon Land Co.*, 148 U. S. 31, 41, 13 Sup. Ct. 458, 37 L. ed. 354; *Carr v. United States*, 98 U. S. 433, 438, 25 L. ed. 209; *United States v. Walker*, (C. C.) 139 Fed. 409, 411, 412, 413; *United States v. Willamette Valley & C. M. Wagon Road Co.* (C. C.) 55 Fed. 711, 717; *Attorney General v. Central Railway Co.*, 68 N. J. Eq. 198, 59 Atl. 348. Thus a state is estopped from ousting a city organized under a *void law* after the city has been exercising its assumed powers for only four years, but has levied and collected taxes and assessments, constructed bridges and streets, and made other improvements meanwhile without protest or objection on the part of the state, *State v. City of Des Moines*, 96 Iowa 521, 532, 533, 65 N. W. 818, 31 L. R. A. 186, 59 Am. St. Rep. 381. And a state is estopped from ousting a private corporation for illegality in its organization after a delay of a few years while the corporation

has been exercising, without objection on the part of the state, its assumed corporate powers, has been collecting and expending money and changing its financial relations to its stockholders and creditors in reliance upon the acquiescence of the state. *Commonwealth v. Bala & Bryan Mawr Turnpike Co.*, 153 Pa. 47, 25 Atl. 1105; *State of Wisconsin v. Janesville Water Power Co.*, 92 Wis. 496, 66 N. W. 512, 515, 32 L. R. A. 391; *State v. Lincoln Street Ry. Co.*, 80 Neb. 333, 114 N. W. 422, 427, 14 L. R. A. (N. S.) 336; *State v. School District No. 108*, 85 Minn. 230, 88 N. W. 751; *Attorney General v. Delaware & Bound Brook R. R. Co.*, 27 N. J. Eq. 1, 24; *People v. Alturas County*, 6 Idaho 418, 55 Pac. 1067, 1068, 44 L. R. A. 122; *Vermont v. Society for the Propagation of the Gospel*, 2 Paine (C. C.) 545, Fed. Cas. No. 16920. According to the decisions of the highest judicial tribunal of the State of Iowa a city may be estopped from claiming a street or an alley, or from maintaining the original lines thereof by acquiescing in the possession, occupation and improvement of it, or of a part of it, by a citizen who claims title thereto by possession and estoppel only. *Corey v. City of Fort Dodge*, 118 Iowa 742, 749, 92 N. W. 704. The same court holds that a like estoppel may arise against a city by its taxation of the property when the claimant in possession pays the taxes. *Smith v. City of Osage*, 80 Iowa 84, 89, 45 N. W. 404; 8 L. R. A. 633; *Dillon Corporations*, Sec. 533; *Audubon County v. Emigrant Co.*, 40 Iowa 460; *Page County v. B. & M. R. R. Co.*, 40 Iowa 520; *Austin v. Bremer County*, 44 Iowa 155; *Adams County v. B. & M. R. R. Co.*, 39 Iowa 507.”

In *United States v. Walker*, (C. C.) 139 Fed. 409, 412, 413, 420, the court refused to sustain the claim, and said:

“When the sovereign comes into court to assert a pecuniary demand against the citizen, the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisdiction of the forum in like subject-matter between man and man.”

ELEVENTH CONCLUSION OF LAW.

That if the compromise with the Bull Head Oil Company, the assignee and owner of the lease, did not enure to the benefit of Dunn and Gillam as stockholders, the measure of any recovery against Dunn and Gillam is the value of the lease at the time it was executed on August 18, 1913, and full value having been paid to the Indian Superintendent and received by the Indian, there is nothing to recover in this suit.

Appellant's 5th proposition (appellant's brief, page 67, etc.) assails the holding of the Court of Appeals that appellant having compromised the case thereby affirmed the lease and could recover no damage because none was proven. Appellant argues that the lease was worth \$16,000.00 to \$20,000.00 in January, 1914, at the time Eaves executed it and the Bull Head was organized. That is immaterial. The lease on *August 18, 1913*, was not worth over

the amount of bonus actually paid. Appellant cites no witness or evidence to the contrary.

Mullen (Rec., pp. 161-162) testifies that the lease, during the latter part of January, 1914, was worth about the capital stock of the Bull Head—that is, about \$18,000.00—and then with respect to the value of the lease in August, 1913, says:

“After the first well came in down here in August, 1913, we looked on it with suspicion —this was an agricultural community and we did not pay much attention right then; when the first well came in in this field I leased land right around there—*gave leases away*; I think I know the market value of this Allie Daney lease in August, 1913; the most I heard of was twenty dollars an acre on down to four or five dollars an acre; some of it didn’t bring anything.”

P. C. Dings (Rec., p. 158) says:

“I was living in Ardmore in August, 1913; leases were selling at that time after the well came in, or about the time it came in, all the way from two to four and six and ten to twenty dollars an acre; I was offered a lease myself that afterwards was very productive for five dollars an acre and would not pay but three and they were very productive and I lost them.”

Appellant quotes on page 70 of its brief the letter written by the Oil Inspector on December 22, 1913, to Superintendent Kelsey, recommending a bonus of \$4,000.00, but the record shows that the Oil

Inspector revised his figures. On January 24, 1914, the Oil Inspector made a written report to the Indian Superintendent as follows (Rec., pp. 197-198):

“Copy Rec'd Union Agency Jan. 24-14
Encl. 4770. Lease No. 27965 Refer to H-S.

Report in regard to the adequacy of bonus
—allotment of Allie Daney. January 24, 1914.

With reference to the adequacy of bonus upon the following oil and gas mining lease No. 27965, Allie Daney, a minor, by A. N. Thomas, guardian, Talihina, Oklahoma, to T. H. Dunn and Robert Gillam, Ardmore, Oklahoma, covering the

S2 NW SW and the W2 SW SW of section
4, Township 4S., Range 3W.,

dated August 19, 1913, forty acres, bonus \$70.00, I beg leave to report that upon an investigation of the bonus values in this particular district upon the date of execution of this lease, as determined by the presumed capacity of a well brought in upon the Apple-Franklin land in the

SE4 NW NE of section 8-4-3,

August 7, 1913, I find varying sums paid for acreage ranging from \$1.00 to as high as \$10.00 per acre.

Taking into consideration all the facts, I am of the opinion that a bonus of \$70.00 upon August 19, 1913, was inadequate. The present stage of development on tracts adjoining this lease calls for prompt drilling upon the same in order to properly protect the interest of said minor. I therefore advise that it is to the best interests of the minor that in lieu of further cash bonus, there should be required a bonus

consideration in the total sum of \$2,000.00 to be taken out of the first oil produced from this lease, said sum to be paid in monthly installments at the rate of 25 per cent of the gross monthly runs, exclusive of the royalty interest, until the entire amount is remitted to the United States Indian Agent, to the credit of said minor, and I so recommend.

United States Oil Inspector.”

Superintendent Kelsey in his letter of January 31, 1914, to the Indian Commissioner (Rec., pp. 106-109) states:

“On January 24, 1914, the United States Oil Inspector reported that the bonus of \$70.00 paid by Dunn & Gillam was inadequate, and advised that it is to the best interests of the minor that in lieu of an additional cash bonus to be paid at this time, the lessees be required to pay a further bonus of \$2000.00, to be taken out of the proceeds of the sale of the first oil produced, and to be paid in monthly installments at the rate of 25% of the gross monthly runs exclusive of royalty interest of 12½ per cent recited in the lease.”

The Court of Appeals was correct in stating that the plaintiff had fared very well. She got the \$2,070.00 bonus and \$45,000.00 in addition. Appellant alleges in the 9th paragraph of its bill (Rec., p. 9) that “a much more valuable lease could have been procured for the use and benefit of said Allie Daney, and that one responsible oil operator then stood ready and willing to pay \$10,000.00 by way of

bonus for an oil and gas lease on the lands in paragraph No. 1 described." That alleged responsible oil operator did not appear as a witness on the trial to give testimony as to value on Aug. 18, 1913, or any other day.

Omitting the \$12,500.00 attorney fee paid the Assistant to the Attorney General, the \$45,000.00 plus the \$2,070.00 cash bonus, makes \$47,070.00—a sum almost five times the amount appellant alleges could have been received for the lease in August, 1913. Appellant contends that the lease in January, 1914, was worth \$16,000.00 to \$20,000.00, and yet, taking January as the date for determining the value, it appears that Allie Daney has received almost three times the value of the lease in January, 1914. So she has fared very well. The Government never offered to pay back the cash bonus but kept it all through this litigation and this reminds us of the remarks of Judge ADAMS, speaking for the Eighth Circuit Court of Appeals in *Burnes v. Burnes*, 137 Fed. 800, as follows:

"Nor can he retain the fruits of a bad bargain and maintain a suit for enough more to make it a good one. The four children of Daniel still keep the 177 shares of the stock of the Burnes estate, which were worth \$115,000 in 1889, and which are now, with the 375 shares returned to the corporation and retired, worth \$1,100,000, and ask a court of equity to sweeten their trade by transferring to them other shares worth many hundred thousand dollars more.

They purchased the 177 shares, now worth \$1,100,000, with property worth no more than \$275,000 in 1889. Their retention of the fruits of their bargain through all these years is alike fatal to a claim for the rescission of their agreement and *to their prayer to the chancellor to make for them a better bargain. McLean v. Clapp, 141 U. S. 429, 12 Sup. Ct. 29, 35 L. ed. 804; The Earnest M. Munn, 13 C. C. A. 510, 511, 66 Fed. 356, 357; Grymes v. Sanders, 93 U. S. 55, 62, 23 L. ed. 798; Breyfogle v. Walsh, 80 Fed. 172, 176, 177, 25 C. C. A. 357, 362."*

WE THEREFORE RESPECTFULLY SUBMIT:

- (1) That Thomas was not guardian and that obtaining a lease from him in no way injured Allie Daney.
- (2) That Dunn and Gillam did not occupy a fiduciary relationship to Allie Daney at any time, and can not be made to account for any profit they made by virtue of the spurious lease executed by a counterfeit guardian.
- (3) That, assuming without conceding, Thomas was the guardian, the appellant has affirmed the lease by the compromise and can not prosecute the suit against one or two stockholders especially in view of the compromise negotiated by appellant with the corporation, under which compromise agreement the corporation used its funds for the special preferential benefit of certain stockholders.

to the exclusion of other stockholders—a thing illegal and fraudulent.

We therefore respectfully submit that the Government's appeal should either be dismissed or the judgment of the Court of Appeals affirmed.

Respectfully submitted,

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Of Counsel.

SUPREME COURT OF THE UNITED STATES

October Term, 1908.

UNITED STATES OF AMERICA, Appellant,

vs.

T. H. DUNN, W. E. DUNN, ET AL., Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

**Supplemental Brief for the Dunns,
Appellees.**

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IN THE SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1924.

No. 120.

UNITED STATES OF AMERICA, *Appellant*,
vs.
T. H. DUNN, N. E. DUNN, *ET AL.*, *Appellees*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR THE DUNNS,
APPELLEES.

May It Please the Court:

Supplemental to pages 25 to 30 of our original brief we offer the following:

A.

The Eaves Curatorship Survived Statehood.

This point is firmly settled by a long line of Oklahoma decisions. To overrule them would destroy many titles and work great injury to many innocent parties.

—*Eaves v. Mullen*, 25 Okl. 679;

Burdett v. Burdett, 26 Okl. 416;

MaHarry v. Eatman, 29 Okl. 46;

Scott v. McGirth, 41 Okl. 520;

Crosbie v. Brewer, 68 Okl. 16.

This is true by virtue of section 1 of the schedule to the Oklahoma Constitution. It is agreed, over the signature of counsel (see Rec., pp. 234-240) that upon the admission of Oklahoma as a state all guardianships, curatorships, etc., pending in the United States Court for the Southern District of the Indian Territory at Marietta passed into the County Court of Love County, Oklahoma.

B.

As stated under point 2, page 25, of appellee's original brief, "Two separate and distinct guardianships or curatorships cannot exist at the same time in the same state for one and the same person."

A guardianship of the estate of a minor is, in a sense, a proceeding *in rem*.

Section 3330, Oklahoma R. L. 1910, expressly declares that, "In all cases the court making the appointment of a guardian has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward."

Section 6544, Oklahoma R. L. 1910, declares that, "Every guardian must manage the estate of his ward frugally and without waste," etc., and "may sell the real estate, upon obtaining an order of the County Court therefor," etc.

Section 6569, Oklahoma R. L. 1910, declares that "the County Court may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects, as circumstances require."

Under the authority of the above sections of the statute the County Court of Love County had jurisdiction to approve the lease executed by Eaves.

—Duff v. Keaton, 33 Okl. 92;

Papoose Oil Company v. Swindler, 95 Okl. 264, 221 Pac. 506;

Cabin Valley Mining Co. v. Hall, 53 Okl. 760;

Jackson v. Gates Oil Company, 297 Fed. 549 (8th Cir. Apps.);

Clayton v. Tibbens, 298 Fed. 18 (8th Cir. Apps.).

As the Love County Court acquired jurisdiction over the estate of Allie Daney, as successor to the United States Court for the Southern District of the Indian Territory, it thereby, under the express provisions of section 3330, Oklahoma R. L. 1910, had "exclusive jurisdiction to control him in the management and disposition of * * * the property of his ward."

In *Dewalt v. Cline*, 35 Okl. 199, the court said:

"The County Court in acquiring jurisdiction of the estate or *rem* had jurisdiction coextensive with the state in the settlement of the estate of the decedent and the sale and distribution of his real estate, *and excluded the jurisdiction of the County Court of every other county*. Sections 5144 and 5510, Comp. Laws 1909; sections 1178 and 1542, St. Okl. 1893; section 2 of the Schedule to the Constitution.

"Section 23 of the Schedule (to the Okla. Constitution), *supra*, contemplated that such pending probate proceedings should continue to final determination just as if there had been no change in the form of government. *Eaves v. Mullen*, 25 Okl. 679, 107 Pac. 433; *Davis v. Caruthers*, 22 Okl. 323, 97 Pac. 581." (Italics ours.)

In *Crosbie v. Brewer*, 68 Okl. 22, the court, in an opinion involving conflicting guardianships, one of which originated before statehood, said:

“When one court has acquired jurisdiction, no other court of concurrent jurisdiction will interfere or attempt to assume jurisdiction of the same matter. *Mail v. Maxwell, et al.*, 107 Ill. 554. It is fundamental that the court which first acquires jurisdiction of the parties and subject-matter will retain it until divested of it by some court of appellate powers or the cause is regularly transferred in some way provided by statute. Any other procedure would lead to inextricable confusion and conflict.”

See, also, the following guardianship cases:

Soules v. Robinson, 158 Ind. 97, 92 Am. St. Rep. 301;

Gilbert v. Stephens, 106 Ga. 753, 32 S. E. 849;

Estridge v. Estridge, (Ky.) 76 S. W. 1101.

Under these decisions the second guardianship is void. When the Love County Court, as the successor to the United States Court, obtained jurisdiction over the guardianship of the estate of Allie Daney her property was withdrawn from the jurisdiction of every other County Court in the state. A guardianship like a receivership cannot be managed and operated under the direction and supervision of two different courts, although they may have original concurrent jurisdiction over that class of cases. The rule is summed up by this court in *Wabash Railroad v. Adelbert College*, 208 U. S. 54, as follows:

“When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is there-

by withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property. * * * Those principles are of general application and not peculiar to the relations of the courts of the United States to the courts of the states." (Italics ours.)

See, also:

Palmer v. Texas, 212 U. S. 125;

Farmers' Loan & Trust Co. v. Lake Street Elevated R. Co., 177 U. S. 51-61.

The Love County Court's jurisdiction over the estate was coextensive with the State of Oklahoma without regard to where the land or property was situated.

—*Dewalt v. Cline*, 35 Okl. 197.

The LeFlore County Court had no jurisdiction even to appoint Thomas guardian of the person inasmuch as the guardianship over her estate was in Love County and the proper way to get the guardianship into LeFlore County was by removal, as provided for by sections 6196, 6197 and 6198, Okla. R. Laws 1910.

The Oklahoma Legislature passed an Act effective February 26, 1910, providing for the transfer of guardianships from the County Court inheriting the same from the United States Court in the Indian Territory, to

the County Court of the minor's domicile—to take care of cases exactly like this. The Act of 1910, is embodied in sections 6196 to 6198, inclusive, Oklahoma R. L. 1910, section 6196 being as follows:

*“When it is made to appear that any probate matter pending in any court of this state, which, by Acts of Congress and the constitution, was transferred from the courts of the Territory of Oklahoma and the United States Courts, in the Indian Territory to the courts of this state, is not in the county where the venue of such suit, matter or proceeding would lie if arising after the admission of this state into the Union, the court where such suit, matter or proceeding is pending shall, upon the application of the guardian, * * * make an order transferring such suit, matter or proceeding to the county where the venue would properly lie if such suit, matter or proceeding had arisen since the admission of this state into the Union, by transmitting to such county the original papers, together with certified copies of all orders and judgments, upon the payment of all accrued costs.”*

In *Leonard v. Childers*, 67 Okl. 226, the court, discussing conflicting guardianships, said:

“There was no provision for concurrent jurisdiction of County Courts in administering the estates of minors, nor any provision for a guardianship of the person in one county and of the estate in another county, but the court having jurisdiction to appoint a guardian of the person was the court having jurisdiction to appoint a guardian of the estate.”

It is clear that the only way the LeFlore County Court could acquire jurisdiction was by a transfer of the existing guardianship from Love County to the County Court of LeFlore County, and that not having been done, the Thomas guardianship was absolutely void.

Respectfully submitted,

GEO. S. RAMSEY,

WILLIAM G. JOHNSON,

HUGH W. MCGILL,

EDGAR A. DEMEULES,

VILLARD MARTIN,

Counsel for T. H. and N. E. Dunn.



MAR 30 1925

U. S. CIRCUIT COURT

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 120.

UNITED STATES OF AMERICA, APPELLANT,

vs.

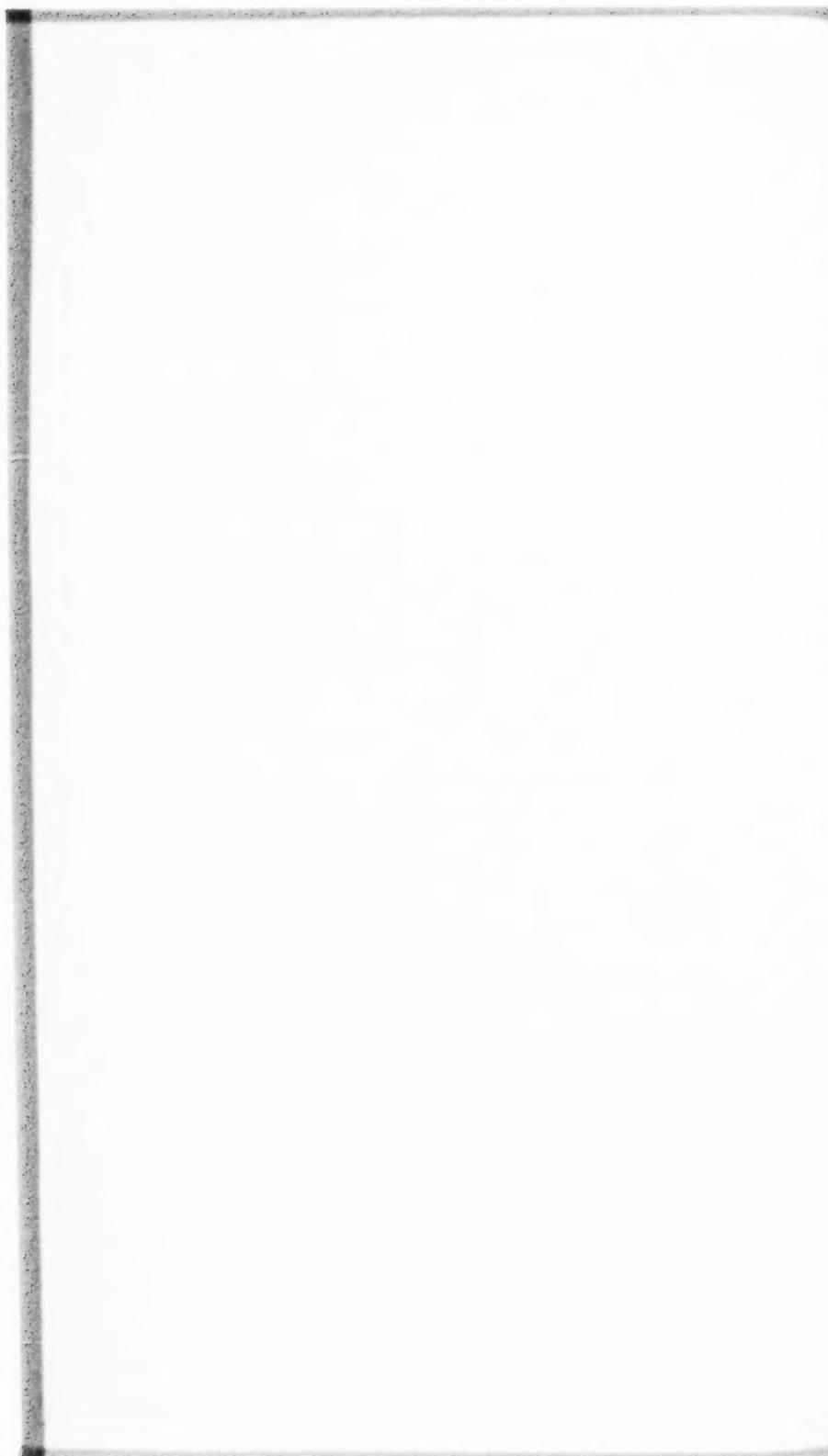
T. H. DUNN, N. E. DUNN, ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

**SUPPLEMENTAL BRIEF FOR THE DUNNS,
APPELLEES.**

GEO. S. RAMSEY,
WILLIAM B. JOHNSON,
HUGH W. MCGILL,
EDGAR A. DE MEULES,
VILLARD MARTIN,

Counsel for T. H. and N. E. Dunn.



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1924.

No. 120.

UNITED STATES OF AMERICA, APPELLANT,

vs.

T. H. DUNN, N. E. DUNN, ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

**SUPPLEMENTAL BRIEF FOR THE DUNNS,
APPELLEES.**

MAY IT PLEASE THE COURT:

Since the filing of appellant's brief and appellees' reply, an Oklahoma Supreme Court Commissioner, on January 7, 1925, handed down the opinion in *Burton vs. Collie*, set forth at large in an appendix to the appellant's reply brief. That

opinion attempts to commit the Court to the unprecedented holding that two separate courts may exercise concurrent jurisdiction over the same estate of an infant through two separate guardianships. That case is now pending on rehearing before the Supreme Court, and when it will be decided no one can very well guess, as the Oklahoma Supreme Court of January 30, 1925, had under consideration 236 petitions to rehear, some of which have been pending for nearly a year. (See Jan. 30, 1925; Okla. App. Court Rep.)

The Government never before contended that the Eaves and Thomas guardianships were both valid, but pitched its battle against the Eaves guardianship, as shown by the allegations in the bill (Rec., p. 8).

The present opinion in *Burton vs. Collie* not only violates that common-sense principle so universally accepted by this Court and the State courts, to wit, that "when a court of competent jurisdiction has, by appropriate proceedings, taken property in its possession through its officers, the property is thereby *withdrawn from the jurisdiction of all other courts*," but ignores six prior Oklahoma Supreme Court decisions expressly holding the first guardianship excludes the jurisdiction of *all* other courts to appoint a guardian for the same infant. The very learned Commissioner writing the opinion in *Burton vs. Collie* failed to comprehend the difference between jurisdiction *in personam* and *in rem*. He confounds concurrent jurisdiction in personal actions with proceeding *in rem*. True it is that in personal actions it is *not* the judgment in the action *first* begun, but the *first final* judgment, though it may be in the last action brought, that renders the issues *res judicata* in both actions.

The learned Commissioner's suggestion that although both

the Love County Court and Le Flore County Court have actual concurrent jurisdiction, an action begun in one of said Courts (say in the Le Flore County Court) to sell land may be abated on the application of the guardian in the other county (say Love County), further shows he failed to comprehend the basic reason for the rule that two Courts can not and will not attempt to exercise jurisdiction over the same estate or property at the same time. Suppose one Court refused to abate, then what? And then suppose the two Courts order their respective guardians to contract with separate lessees on the same day, which lease is good? And is it necessary that each Court and guardian have an agent stationed in the court room of the other Court to watch every day's proceedings so a motion to abate can be filed before any order is made? The Commission's opinion, if it stands, will have the very great merit of making two or more guardianships grow where only one grew before, and with every new guardianship there will bud and ripen attorney fees for the new guardian's lawyers. When the first legal guardian refuses to deal with the estate of his ward to suit the interest of some land or mineral-lease grafter, a small sum will induce the infant to move to another county, where a friendly guardian may be appointed. It is inconceivable that the Oklahoma Supreme Court will let that opinion stand. This Court is not bound by the decision in *Burton vs. Collie* because it does not follow the settled rule in Oklahoma to the contrary.

In *Burgess vs. Seligman*, 107 U. S., 20-35, this Court said:

"When the transaction took place, and the decision of the Circuit Court was rendered, not only was there no settled construction of the statute on the point

under consideration, but the Missouri cases referred to arose upon the *identical* transactions which the Circuit Court was called upon to consider. It can hardly be contended the Federal Court was to wait for the State Court to decide the merits of the controversy and then simply *register* their decision; or that the judgment of the Circuit Court should be reversed merely because the State Court has adopted a different view." See also *Kuhn vs. Fairmont Coal Co.*, 215 U. S., 349.

Supplemental to pages 25 to 30 of our original brief we offer the following:

A.

The Eaves Curatorship Survived Statehood.

This point is firmly settled by a long line of Oklahoma decisions. To overrule them would destroy many titles and work great injury to many innocent parties.

Eaves v. Mullen, 25 Okl., 679;
Burdett v. Burdett, 26 Okl., 416;
MaHarry v. Eatman, 29 Okl., 46;
Scott v. McGirth, 41 Okl., 520;
Crosbie v. Brewer, 68 Okl., 16.

This is true by virtue of sections 1 and 23 of the schedule to the Oklahoma Constitution, and section 19 of Oklahoma Enabling Act (34 St. L., p. 267). It is agreed, over the signature of counsel (see Rec., pp. 234-240), that upon the admission of Oklahoma as a State all guardianships, curatorships, etc., pending in the United States Court for the Southern District of the Indian Territory, at Marietta, passed into the County Court of Love County, Oklahoma.

B.

As stated under point 2, page 25, of appellee's original brief, "Two separate and distinct guardianships or curatorships can not exist at the same time in the same State for one and the same person."

A guardianship of the *estate* of a minor is a proceeding *in rem*—as much so as a receivership or administration of a decedent's estate.

Section 3330, Oklahoma R. L., 1910, expressly declares that "In all cases the court making the appointment of a guardian has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward."

Section 6544, Oklahoma R. L., 1910, declares that "Every guardian must manage the estate of his ward frugally and without waste," etc., and "may sell the real estate, upon obtaining an order of the County Court therefor," etc.

Section 6569, Oklahoma R. L., 1910, declares that "The County Court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects, as circumstances require."

Under the authority of the above sections of the statute the County Court of Love County had jurisdiction to approve the lease executed by Eaves on the very day it was executed.

Duff v. Keaton, 33 Okl., 92;

Papoose Oil Company v. Swindler, 95 Okl., 264; 221
Pac., 506;

Cabin Valley Mining Co. v. Hall, 53 Okl., 760;

Jackson v. Gates Oil Company, 297 Fed., 549 (8th

Cir. Apps.);

Clayton v. Tibbens, 298 Fed., 18 (8th Cir. Apps.).

As the Love County Court acquired jurisdiction over the estate of Allie Daney, as successor to the United States Court for the Southern District of the Indian Territory, it thereby, under the express provisions of Section 3330, Oklahoma R. L., 1910, had "exclusive jurisdiction to control him in the management and disposition of * * * the property of his ward."

In *Dewalt v. Cline*, 35 Okl., 199, the court said:

"The County Court in acquiring jurisdiction of the estate or *rem* had jurisdiction coextensive with the State in the settlement of the estate of the decedent and the sale and distribution of his real estate, *and excluded the jurisdiction of the County Court of every other county*. Sections 5144 and 5510, Comp. Laws, 1909; sections 1178 and 1542, St. Okl., 1893; section 2 of the Schedule to the Constitution.

"Section 23 of the Schedule (to the Okla. Constitution), *supra*, contemplated that such pending probate proceedings should continue to final determination just as if there had been no change in the form of government. *Eaves v. Mullen*, 25 Okl., 679; 107 Pac., 433; *Davis v. Caruthers*, 22 Okl., 323; 97 Pac., 581." (Italics ours.)

In *Crosbie v. Brewer*, 68 Okl., 22, the Court, in an opinion involving conflicting guardianships, one of which originated before statehood, said:

"When one Court has acquired jurisdiction, no other Court of concurrent jurisdiction will interfere or attempt to assume jurisdiction of the same matter.

Mail v. Maxwell et al., 107 Ill., 554. It is fundamental that the Court which first acquires jurisdiction of the parties and subject-matter will retain it until divested of it by some Court of appellate powers or the cause is regularly transferred in some way provided by statute. Any other procedure would lead to inextricable confusion and conflict."

See, also, the following guardianship cases:

Soules v. Robinson, 158 Ind., 97; 92 Am. St. Rep., 301;
Gilbert v. Stephens, 106 Ga., 753; 32 S. E., 849;
Estridge v. Estridge (Ky.), 76 S. W., 1101.

Under these decisions the second guardianship is void. When the Love County Court, as the successor to the United States Court, obtained jurisdiction over the guardianship of the estate of Allie Daney, her property was withdrawn from the jurisdiction of every other County Court in the State. A guardianship, like a receivership, cannot be managed and operated under the direction and supervision of two different courts, although they may have original concurrent jurisdiction over that class of cases. The rule is summed up by this Court in *Wabash Railroad v. Adelbert College*, 208 U. S., 54, as follows:

"When a Court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the Court which has seized it.

For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property. * * * Those principles are of general application and not peculiar to the relations of the courts of the United States to the courts of the states." (Italics ours.)

See, also:

Palmer v. Texas, 212 U. S., 125;

Farmers' Loan & Trust Co. v. Lake Street Elevated R. Co., 177 U. S., 51-61.

The Love County Court's jurisdiction over the estate was coextensive with the State of Oklahoma without regard to where the land or property was situated.

Dewalt v. Cline, 35 Okla., 197.

The Le Flore County Court had no jurisdiction even to appoint Thomas guardian of the person inasmuch as the guardianship over her estate was in Love County and the proper way to get the guardianship into Le Flore County was by removal, as provided for by sections 6196, 6197, and 6198, Okla. R. Laws, 1910.

The Oklahoma Legislature passed an Act effective February 26, 1910, providing for the transfer of guardianships from the County Court inheriting the same from the United States Court in the Indian Territory to the County Court of the minor's domicile—to take care of cases exactly like this.

The Act of 1910 is embodied in sections 6196 to 6198, inclusive, Oklahoma R. L., 1910, Section 6196 being as follows:

“When it is made to appear that any probate matter pending in any Court of this State, which, by acts of Congress and the constitution, *was transferred from the courts of the Territory of Oklahoma and the United States courts, in the Indian Territory to the courts of this State, is not in the county where the venue of such suit, matter or proceeding would lie if arising after the admission of this State into the Union*, the Court where such suit, matter or proceeding is pending shall, upon the application of the guardian, * * * make an order transferring such suit, matter or proceeding to the county where the *venue would properly lie if such suit, matter or proceeding had arisen since the admission of this State into the Union*, by transmitting to such county the original papers, together with certified copies of all orders and judgments, upon the payment of all accrued costs.”

In *Leonard v. Childers*, 67 Okl., 226, the Court, discussing conflicting guardianships, said:

“There was no provision for concurrent jurisdiction of county courts in administering the estates of minors, nor any provision for a guardianship of the person in one county and of the estate in another county, but the Court having jurisdiction to appoint a guardian of the person was the Court having jurisdiction to appoint a guardian of the estate.”

In *Parmenter vs. Rowe*, — Okla., —; 200 Pae., 683, the Oklahoma Supreme Court in 1921 sustained its writ of prohibition, directed to the County Court of Okfuskee County,

restraining that Court from appointing a guardian for Martha Jackson, a resident of that county, it being made to appear that a guardian had been appointed prior thereto by the County Court of Seminole County. In the opinion the Chief Justice said:

"When the County Court of Seminole County took jurisdiction, the same was coextensive with the State, and *excluded the jurisdiction of every other county.*"

In *Baird vs. England*, — Okla., —; 205 Pac., 1098, decided in 1922, the Court was considering the jurisdiction of a County Court over the administration of an estate. An administrator was appointed by the United States Court for the Northern District of the Indian Territory, and upon statehood the County Court of Cherokee County, Oklahoma, took jurisdiction as the successor to the United States Court in the Territory. The Supreme Court held that no other County Court in the State could acquire jurisdiction and said:

"The County Court that first acquires jurisdiction to administer on the estate of a deceased person has jurisdiction to the exclusion of the County Court of every other county."

State ex rel., etc., vs. Hazelwood, 196 Pac., 937, is another writ of prohibition case in which the Oklahoma Supreme Court granted a writ to restrain the McIntosh County Court from appointing an administrator, it appearing the County Court of another county had made a prior appointment.

The Commissioner, in his opinion in *Burton vs. Collie*, does not pretend to overrule these prior opinions, but actually

cites some of them to support his conclusion. A citation to Taltarum's case would have been more in point.

Section 19 of Oklahoma Enabling Act (*34 St. L., p. 267*) provides "That the courts of original jurisdiction of such State shall be deemed to be the successor of all courts of original jurisdiction of said Territories and as such take and retain custody of all records," etc.

This Act of the Legislature was passed under the authority of Section 23 of Article 25 of the Oklahoma Constitution, which is as follows:

"When this Constitution shall go into effect, the books, records, papers and proceedings of the Probate Court in each county, and all causes and matters of administration and guardianship, and *other matters pending therein*, shall be transferred to the County Court of such county, except of Day County, which shall be transferred to the County Court of Ellis County, and the County Courts of the respective counties shall proceed to final decree or judgment, order, or *other termination* in the said several *matters* and *causes* as the said Probate Court might have done if this Constitution had not been adopted. The District Court of any county, the successor of the United States Court for the Indian Territory, in each of the counties formed in whole or in part in the Indian Territory, shall transfer to the County Court of such county, all matters, proceedings, records, books, papers, and documents appertaining to all causes or proceedings relating to estates: *Provided, That the Legislature may provide for the transfer of any of said matters and causes to another county than herein prescribed.*"

It is clear that the only way the Le Flore County Court could acquire jurisdiction was by a transfer of the existing guardianship from Love County to the County Court of Le Flore County, and that not having been done, the Thomas guardianship was absolutely void.

Respectfully submitted,

GEO. S. RAMSEY,
WILLIAM G. JOHNSON,
HUGH W. McGILL,
EDGAR A. DE MEULES,
VILLARD MARTIN,

Counsel for T. H. and N. E. Dunn.

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FILED

DEC 8 1924

WM. R. STANBURY

7-104

No. 120

In the Supreme Court of the United States

October Term, 1924.

UNITED STATES OF AMERICA, *Appellant,*

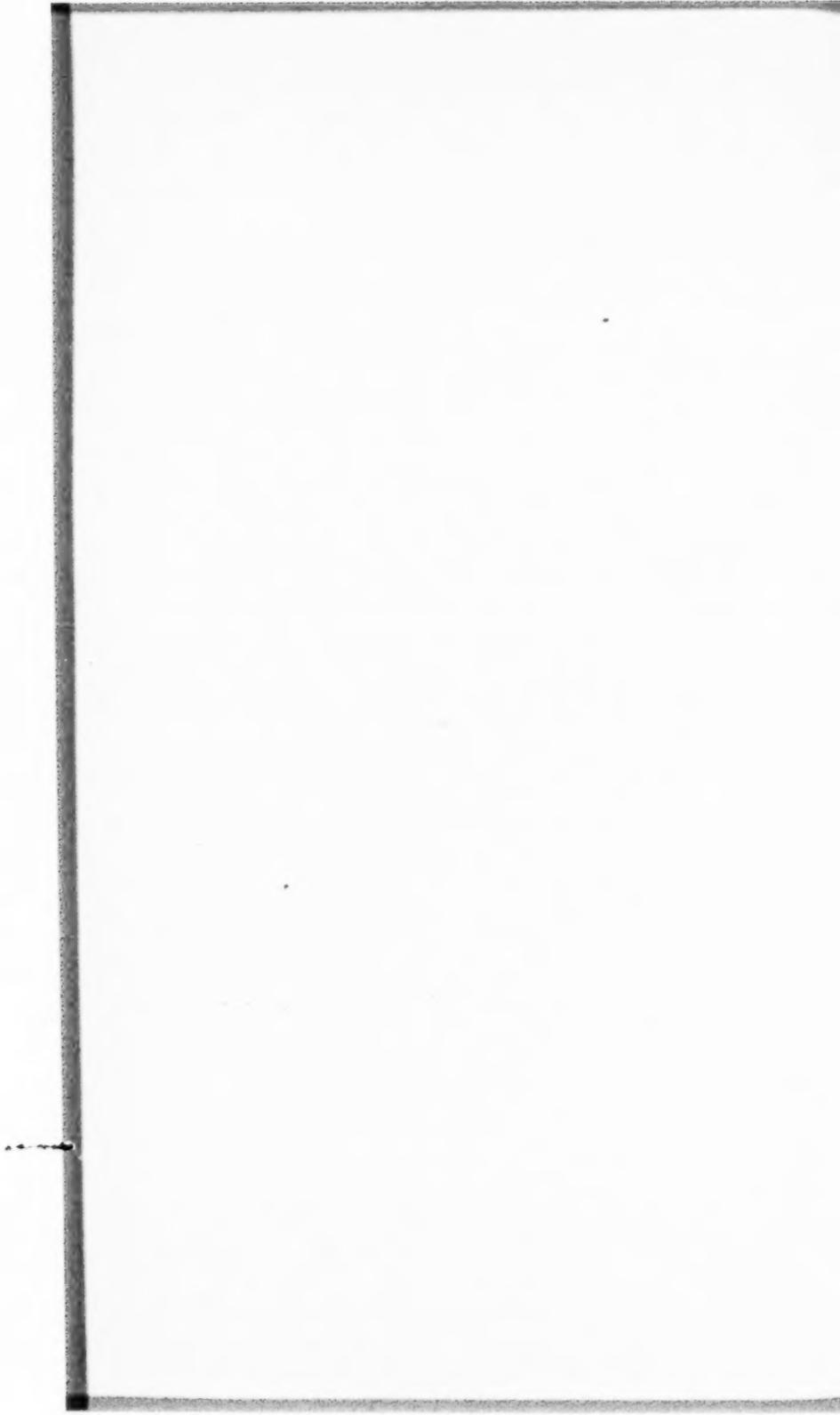
VERSUS

T. H. DUNN, N. E. DUNN, *ET AL., Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

Brief for J. Robert Gillam and Wife,
Appellees.

WILLIAM G. DAVISSON,
Counsel for the Gillams.



IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1924.

No. 120.

UNITED STATES OF AMERICA, *Appellant,*

vs.

T. H. DUNN, N. E. DUNN, *ET AL., Appellees.*

**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.**

**BRIEF FOR J. ROBERT GILLAM AND WIFE,
APPELLEES.**

May It Please the Court:

On behalf of J. Robert Gillam and wife we adopt the brief and argument filed on behalf of Dunn and wife, and in addition thereto call the court's special attention to the following:

The Government brought this suit in *equity* for the cancellation of the oil and gas lease and for an accounting for the oil taken out of the land (see 3rd

and 4th paragraphs of the prayer to the bill, Rec., pp. 14-15). As pointed out in the brief for the Dunns, the Government, if the allegations of the bill are true, had the right to elect to bring a suit in equity for cancellation and accounting, or a suit at law for damages. The Government elected to sue in equity for rescission, cancellation and accounting. After the District Court dismissed the Government's bill on the merits and the case was pending in the Court of Appeals, the Government and the Bull Head Oil Company entered into a compromise agreement wherein the Government agreed to abandon all claims against the Bull Head and certain of its stockholders, to-wit, Jake L. Hamon, J. S. Mullen, Errett Dunlap, and other stockholder defendants, "save and except T. H. Dunn, N. E. Dunn, J. Robert Gillam, and Mrs. J. Robert Gillam," and agreed that it, the Government, "will not insist upon any judgment impressing a trust upon any of the stock in Bull Head Oil Company heretofore owned by J. Robert Gillam or Mrs. J. Robert Gillam and assigned to Jake L. Hamon, but will insist upon a money judgment against them for whatever amount the testimony may show should be awarded" (see Rec., pp. 256-257). Neither Dunn and wife nor Gillam and wife were parties to this compromise agreement. Gillam and wife were not the owners of any stock in the Bull Head Oil Company at the time this compromise agreement was entered into. The Government's bill alleges that the lease was obtained

from Thomas, guardian, by fraud, and if that is true, the Government, as suggested, had the right to elect whether it would repudiate the lease and maintain a suit in equity for rescission or affirm the lease and maintain a suit *at law* for damages. Having elected to rescind and filed its suit in equity the Government cannot amend its bill in the Court of Appeals under a stipulation with a part of the defendants and without the knowledge and consent of the Gillams, and thereby convert the suit into an action at law for damages.

We make two points:

(1) That having elected to disaffirm the lease and sue in equity for rescission and cancellation, the Government could not, by way of amendment in the trial court, reverse its election, abandon the suit in equity for rescission, affirm the lease and convert its suit into an action at law for damages.

(2) Assuming that the trial court would have been justified in allowing the Government to convert the action, by amendment, into a suit at law for damages, certainly the action can not be changed after the case reaches the Court of Appeals so as to convert this suit into an action for damages.

The compromise agreement wherein the Government agreed to waive its alleged right to impress a trust upon the stock formerly owned by the Gillams and sold by them to Jake L. Hamon and in lieu thereof "insist upon a money judgment against

them for whatever amount the testimony may show should be awarded," was made and entered into without the knowledge or consent of the Gillams and without any notice to them. Obviously the Government, by consent of a part of the defendants and without notice to the other defendants, or without their consent, can not convert this action into a suit at law. If the Government had elected to affirm the lease and sue for damages it would have had an adequate remedy at law and equity would have no jurisdiction. Obviously the Government can not change the suit after it has been appealed, and this is true without regard to whether or not the trial court could have properly permitted an amendment converting the action into a suit at law. In a law action defendants would have a right to a trial by jury.

In *Shields v. Barrow*, 17 How. 130-146, 15 L. ed. 158, this court said:

"A bill may be originally framed with a double aspect, or may be so amended as to be of that character, but the alternative case stated must be the foundation for precisely the same relief."

That means, however, that the suit must remain an action in equity.

In *Hardin v. Boyd*, 113 U. S. 756-768, 28 L. ed. 1141, this court said:

"It may be said, generally, that in passing upon applications to amend the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice. * * * And an amendment should rarely, if ever, be permitted where it would materially change the very substance of the case made by the bill, and to which the parties have directed their proof."

In *Smith v. Woolfolk*, 115 U. S. 143-150, 29 L. ed. 359, this court, quoting from *Shields v. Barrow*, *supra*, said:

"To insert a wholly different case is not properly an amendment and should not be considered within the rules on that subject."

We therefore respectfully submit that the judgment of the Court of Appeals should be affirmed.

WILLIAM G. DAVISSON,
Counsel for the Gillams.



UNITED STATES *v.* DUNN ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

No. 120. Argued March 13, 1925.—Decided April 13, 1925.

1. Parties who take a lease of a ward's property under a secret agreement with the guardian making the lease that it shall inure in part to his personal benefit, hold the lease, and if that be transferred to a purchaser, hold the proceeds they acquire from it, as trustees *ex maleficio* for the ward without regard to whether the ward was actually damaged by the fraud of the guardian. P. 130.
2. In such cases, the ward may, at his option, follow the fraudulently diverted trust *res* until it reaches the hands of a *bona fide* purchaser for value, or claim the proceeds of the sale or other disposition of it in the hands of the person who fraudulently acquired it from the fiduciary and in the hands of that person's donees. P. 132.
3. A suit to establish an equitable claim to specific property may be prosecuted to subject the proceeds of that property to the trust, if it develop in the course of the trial that the defendant has conveyed it away in violation of his equitable duty to the plaintiff. P. 133.
4. The guardian of an Indian leased his ward's land partly in consideration of a secret interest for himself agreed to by his lessees; and afterwards, in a compromise between the lessees and one who had obtained a lease of the same land from the Indian's curator, the guardian's lease was executed by the curator also and, having been approved by a County Court and by the Secretary of the Interior, was assigned to a corporation, shares of which were issued to the respective lessees and parties claiming under them, the assignment of the lease being the sole consideration for the shares distributed to the lessees of the guardian. *Held*, (a) that a suit by the United States, on behalf of

Argument for Appellees.

268 U. S.

the Indian, to set the lease aside or for alternative relief, could be prosecuted to reach the shares, or the proceeds thereof, in the hands of the fraudulent lessees and their donees, including shares bought by these lessees from the guardian, even though relief could not be had as against the corporation and *bona fide* purchasers for value; and (b) that an agreement by the plaintiff after defeat in the District Court, not to prosecute the appeal as against the corporation and *bona fide* shareholders, did not prevent this relief as against the others. P. 135.

5. In a suit praying relief from the execution and legal effects of a lease because it was procured by the fraud of the lessees, the lessees can not, while claiming under it and holding the benefits derived from it, deny the authority of the lessor to make it. P. 135.
6. One who claims the benefit derived from a breach of trust in which he actively participated and who shows no prejudice from a delay of six years in bringing suit to compel him to account, can not complain of laches. P. 136.

288 Fed. 158, reversed in part; affirmed in part.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed a bill brought by the United States, on behalf of a full-blooded Choctaw Indian, a minor, to cancel for fraud an oil and gas lease on the Indian's land in Oklahoma, or, in the alternative, to affix a trust on shares held by defendants in a corporation, also a defendant, to which the lease had been assigned.

Messrs. Walter A. Ledbetter and W. W. Dyar, Special Assistants to the Attorney General, for the United States. The *Solicitor General* was on the briefs.

Messrs. George S. Ramsay and William G. Davisson, for appellees. *Messrs. William B. Johnson, Hugh W. McGill, Edgar A. de Meules*, and *Villard Martin* were on the briefs.

Eaves was the duly appointed, qualified, legal and acting curator or guardian of the estate, and as such was the only person empowered by law to execute an oil lease

on the land in question. Two separate and distinct guardianships or curatorships cannot exist at the same time for one and the same person. Eaves was not only *de jure* curator, because he actually occupied the office and exercised the authorities of a curator. The lease executed by Eaves, curator, to Mullen, under the order and confirmation of the County Court of Love County, was valid and binding subject to the approval of the Secretary of the Interior—that is to say, it was as valid and binding as possible to make under the law, the Secretary's approval being necessary to its final confirmation.

The execution of a lease on the same land to Dunn and Gillam by a pseudo guardian, no matter how fraudulently obtained, created no actionable wrong in favor of the ward against the lessees under such lease, in the absence of evidence that the ward suffered some injury thereby. Dunn and Gillam, occupying no fiduciary relationship to the ward, and having obtained nothing by virtue of the Thomas lease, cannot be held to be trustees of any property or rights or interest acquired by them in the Mullen lease from Eaves by virtue of having used the Thomas lease as a means of coercing Mullen into a compromise agreement whereby they obtained from Mullen, and not from the ward, an interest in the lease. The fact that Eaves joined in the Thomas lease instead of Thomas joining in the Eaves lease in no way alters the legal rights or status of the parties, it clearly appearing that the lease involved in this case never acquired any validity from its execution by Thomas, as guardian, and therefore, insofar as the rights of the parties are involved, we should treat the lease as having been executed solely by Eaves, as curator.

It was immaterial to the Department and to the parties whether Thomas joined in the Eaves lease to Mullen or Eaves joined in the Thomas lease to Dunn and Gillam,

Argument for Appellees.

268 U. S.

that being a mere formality, it being the intention of all parties that if the Thomas lease was good Mullen should have an interest therein and if the Eaves lease was good, then Dunn and Gillam should have an interest in that lease.

Two things must concur to constitute actionable fraud—inequitable conduct and injury. In other words, fraud and damage must concur before a court of equity will grant any relief against a judicial sale. The lease required court approval and partakes of the nature of a judicial sale. Story's Eq. Juris., 14th ed. Vol. 1, §§ 289 and 290; *Bigby v. Powell*, 25 Ga. 244; *Rock, etc., Ry. Co., v. Wells*, 61 Ark. 354, 54 Am. St. Rep. 216; *Shultz v. Shultz*, 36 Ind. 323; *Hartford Fire Ins. Co., v. Meyer*, 30 Neb. 135; *Mass. Benefit Life Ass'n. v. Lohmiller*, 74 Fed. 23; *Ableman v. Roth*, 12 Wis. 81; *Hockaday v. Jones*, 56 Pac. 1054; *Wilson v. Shipman*, 34 Neb. 573. There must not only be fraud, but there must be damage or injury. In other words, it must be shown that it would be inequitable and unjust for the judgment to be enforced, *Felt v. Bell*, 10 Am. & Eng. Dec. in Equity, 35.

Defendants are not estopped to deny the authority of Thomas to act as guardian. Injury is a necessary element of a valid estoppel, and neither the appellant nor its ward is injured by showing that Thomas had no authority, nor is the lessee injured.

The appellant was guardian of the full blooded Indian, and had full power to compromise this case, especially with the approval of the Court of Appeals, which was given. *Tiger v. West'n Inv. Co.* 221 U. S. 286; *United States v. Kagama*, 118 U. S. 375-384; *Heckman v. United States*, 224 U. S. 444. The appellant, being vested with complete authority to institute the suit and control the litigation, has the concomitant power to compromise the case. *Thompson v. Maxwell Land Grant & Ry. Co.*, 168 U. S. 451.

Upon the discovery of the alleged fraud, the United States had one of two remedies: A suit in equity for rescission, cancellation and accounting, in which it would be necessary to offer to do equity by restoring to defendants the consideration paid, etc.; or an action for damages to recover the value of the lease at the time it was fraudulently obtained. *Black, Rescission & Cancellation* (2d ed.), 561.

The plaintiff can not have both of these remedies, and was required to elect which remedy it would pursue, and, having elected to pursue the remedy in equity for rescission, it is bound thereby, *Shappirio v. Goldberg*, 192 U. S. 232. It can not have a judgment for damages or for the stock of any particular stockholder, *Wilson v. New United States Cattle Ranch*, 73 Fed. 994; *Shappirio v. Goldberg, supra; Supreme Council, etc., v. Lippincott*, 134 Fed. 284.

The appellant, with or without the written consent of some of the parties, can not change its action in the Court of Appeals so as to ask for another and different relief against some of the parties not joining in the compromise.

The lease, being an entirety, can not be split up by various suits to cancel against various interested defendants. While an injured party may sue one or all the joint tort feasors for damages, there can be only one suit to cancel a lease, and the compromise and settlement of the suit is an affirmation and ratification of the lease as an entirety and terminates the cause of action against everyone. *I Story, Eq. Juris.*, (14th ed.,) Vol. 1, § 291. If with knowledge of the fraud the party exacts performance or performs himself he condones the fraud, *McLean v. Clapp*, 141 U. S. 429; *Grymes v. Sanders*, 93 U. S. 55; *Burk v. Johnson*, 146 Fed. 209; *Kingman v. Stoddard*, 85 Fed. 740; *Simon v. Goodyear Metallic Rubber Shoe Co.* 105 Fed. 574.

It appears from the evidence that the compromise was a collusive arrangement between the Bull Head Oil Com-

pany and certain of its stockholders whereby certain stockholders, with the consent and approval of appellant, received preferential advantages out of the funds and assets of the corporation in which appellees, Dunn and wife, also stockholders, were not allowed to participate.

The Government, by entering into the compromise contract whereby the corporate funds were to be used for the special benefit of a part of the stockholders to the exclusion of other stockholders, made itself a party to the fraud and cannot, with good grace, further prosecute this action at law or otherwise. The Government does not come into this court with clean hands. See *State of Iowa v. Carr*, 191 Fed. 257-266; *United States v. Walker*, 139 Fed. 409.

If the compromise with the Bull Head Oil Company did not enure to the benefit of Dunn and Gillam as stockholders, the measure of any recovery against Dunn and Gillam is the value of the lease at the time it was executed on August 18, 1913; and, full value having been paid to the Indian Superintendent and received by the Indian, there is nothing to recover in this suit. *Burnes v. Burnes*, 137 Fed. 800.

MR. JUSTICE STONE delivered the opinion of the Court.

This is an appeal from the United States Circuit Court of Appeals for the Eighth Circuit from so much of its decree as affirms a decree of the District Court of the United States for the Eastern District of Oklahoma dismissing the bill of the plaintiff—the appellant here. 288 Fed. 158.

Suit was begun to cancel an oil and gas lease of forty acres of land, given to appellees, Dunn and Gillam, by Thomas, guardian, and signed by Eaves, curator, of Allie Daney, a minor, full-blood Choctaw Indian. Both Thomas and Eaves claimed the right to represent the minor and to lease her land. Eaves was appointed cura-

tor of the minor by the United States Court for the Southern District of the Indian Territory in November, 1905, and, on admission of the Territory of Oklahoma and the Indian Territory to statehood as the State of Oklahoma, that court transmitted the curatorship record to the County Court of Love County. Thomas was appointed guardian by the County Court of LeFlore County in July, 1911. On August 18, 1913, Eaves executed a lease of the premises in question to one Mullen, which lease was approved by the County Court of Love County. On the same day, Thomas, as guardian, executed a lease of the same premises to Dunn and Gillam, which lease was approved by the County Court of LeFlore County. The two leases came to the Indian Superintendent for his recommendation for approval by the Secretary of the Interior at about the same time. This developed a controversy between Mullen on the one hand and Dunn and Gillam on the other as to whether Thomas or Eaves properly represented the minor and had legal authority to enter into a lease of the minor's lands. A compromise was finally effected between the contesting parties whereby Eaves added his signature as curator to the lease which had been given by Thomas to Dunn and Gillam and acknowledged it. At the same time the Bull Head Oil Company, a corporation and one of the defendants, was organized. The Thomas lease was assigned to it under an agreement that the lessees would take for their respective interests in the leasehold, equal shares of stock. The capital of the Bull Head Oil Company was fixed at \$18,000, of which 8,000 shares of the capital stock of the Company, having a par value of \$8,000, were issued to Mullen, the lessee under the Eaves lease, and 8,000 shares were issued to Dunn, as trustee, for account of the lessees under the Thomas lease and those claiming under them. The remainder of the capital stock was reserved and issued for other corporate purposes.

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The bill of complaint joined as defendants the Bull Head Oil Company, Dunn and Gillam and their wives and Mullen and others who were stockholders of the Company. It charged that the Thomas lease was voidable because, as alleged, Thomas, the guardian, had been induced to execute the lease by a secret agreement with Dunn and Gillam to the effect that a one-fourth interest in the lease was to be transferred by them to a third person for the personal benefit of Thomas. The bill prayed that the minor, Allie Daney, be decreed to be the owner in fee of the lands described in the Thomas lease; that the defendants be adjudged to have no interest therein and that they be required to account for the oil and gas taken from the land and for the money received by them as the proceeds of the oil and gas so taken and, in the alternative, if for any reason the court should adjudge that the lease of the premises could not be cancelled, then that the defendant stockholders be adjudged the holders of said stock respectively in trust for the minor, and that the plaintiff be awarded the custody thereof for her use and benefit and that the defendants who are or at any time have been stockholders of the Bull Head Oil Company be required to account for all money received by them respectively either as dividends or as proceeds of sale of their stock.

On trial the court found that a part of the consideration moving Thomas, as guardian, to execute the lease to Dunn and Gillam was a one-fourth interest in the lease transferred by them pursuant to a secret agreement with the guardian to a third person for the personal use and benefit of Thomas. The trial court further found that Eaves, as curator, by subscribing his name to the Thomas lease, with the approval of the County Court of Love County and with the approval of the Secretary of the Interior, gave legal validity to that lease; that such action of Eaves was free from the legal effect of the fraud of

Thomas and of Dunn and Gillam, and that by the transfer of the lease to the Bull Head Oil Company in exchange for its issue of capital stock, the full legal ownership of the lease was thereupon vested in the Bull Head Oil Company free from any legal effect of the fraud in the execution of the original lease by Thomas, the guardian. The court also found that of the shares of stock acquired by Gillam as a result of the compromise entered into with Dunn and Gillam by Mullen, 3,266 $\frac{2}{3}$ shares, of which his wife Mrs. Gillam, a party defendant, held 1,266 $\frac{2}{3}$ shares, were sold by them to one Hamon, a party defendant, for the sum of \$75,000 and that Hamon was an innocent purchaser for value of the stock; that the defendant T. H. Dunn still retained his holdings in the stock of the Company. There was also a finding that certain shares of the Dunn and Gillam stock transferred by them respectively to Mrs. Dunn and Mrs. Gillam, were so transferred without consideration. Upon the basis of these findings the court entered its decree in favor of the defendants and dismissed the case.

After the entry of the decree of the District Court the plaintiff, acting by the Secretary of the Interior, entered into an agreement, approved by the Secretary and an Assistant Attorney General, with all the defendants other than the defendants Dunn and his wife and the defendants Gillam and his wife, whereby it was stipulated that, in any appeal which the United States should take from the decision of the District Court in this cause, "the United States would neither ask nor insist upon a reversal of the said cause, or a recovery against the Bull Head Oil Company or against any of the defendants in said cause, save and except T. H. Dunn, N. E. Dunn [wife of T. H. Dunn], J. Robert Gillam and Mrs. J. Robert Gillam and that it will not insist upon any judgment impressing a Trust upon any of the stock in the

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Bull Head Oil Company heretofore owned by J. Robert Gillam or Mrs. J. Robert Gillam and assigned to Jake Hamon, but will insist upon a money judgment against them for whatever amount the testimony may show should be awarded."

Both the District Court and the Circuit Court of Appeals found, and the appellees do not question the correctness of the finding, that the Thomas lease to Dunn and Gillam was procured by fraud; nor can it be questioned on this record that the claim of Dunn and Gillam to rights under the Thomas lease was the only basis and consideration moving from them for the compromise agreement by them with Mullen, claiming under the Eaves lease, which resulted in Dunn and Gillam together receiving in exchange for their interest in the lease, 8,000 shares of the capital stock of the Bull Head Oil Company as the fruits of their fraudulent enterprise. Of this stock Dunn and his wife still hold a substantial amount. Gillam and his wife have converted the stock held by them into cash by sale of it to an innocent purchaser, and the leasehold itself, by the action of Dunn and Gillam, has been transferred to the Bull Head Oil Company and has been adjudged by the decree of the District Court to be beyond the reach of the plaintiff and the plaintiff's ward, and the plaintiff in error has abandoned its appeal from that part of the decree.

There is thus presented the narrow question whether the appellees, Dunn and wife and Gillam and wife, against whom this appeal is now prosecuted, may retain the fruits of this fraudulent course of conduct, immune from attack in a court of equity. The court below rested its decision on the ground that the compromise settlement entered into with the defendants, some of whom were stockholders of the Bull Head Oil Company, other than the appellees against whom this appeal is prosecuted, had the effect of confirming the Thomas lease and,

if the appellant had the right to continue the litigation against Dunn and Gillam, that right is based on their alleged fraudulent conduct and is a claim for damages on account of the fraud, and since there was no evidence that the lease was granted for an inadequate return, there was no basis for an award of legal damages to the appellant.

Undoubtedly in an action at law for fraud or deceit, since the action sounds in damage, the plaintiff must prove damage to establish a right to recover. If Dunn and Gillam had retained the lease which they fraudulently obtained from Thomas, as guardian, the plaintiff could, at its option, either have brought suit in equity against them for the cancellation of the lease, or for damages against the guardian, or possibly also at law for damages against Dunn and Gillam, and on familiar principles any relinquishment of plaintiff's right to cancel the lease would necessarily have limited plaintiff to a right of recovery for damages. But such is not the situation here presented. The grant of the lease by Thomas, the guardian, to Dunn and Gillam with a secret agreement that the guardian should be jointly interested in the lease with Dunn and Gillam, was a fraud upon the ward, rendering the whole transaction voidable at the option of the ward or those legally representing her. It is not necessary in such a situation in order to establish the right to relief to show that the beneficiary was damaged by the fraudulent conduct of the trustee. It is sufficient to establish that the fiduciary has exercised his power of disposition for his own benefit without more. *Michoud et al. v. Girod et al.*, 4 How. 503, 533; *Wardell v. Railway Co.*, 103 U. S. 651, 658; *Thomas v. R. R. Co.*, 109 U. S. 522; *Burns v. Cooper*, 140 Fed. 273, 277; *Mastin v. Noble*, 157 Fed. 506, 509; *New York Central & H. R. R. v. Price*, 159 Fed. 330, and *Lane & Co. v. Maple Cotton Mill*, 232 Fed. 421, 423.

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Dunn and Gillam did not retain their interest in the lease which they had fraudulently acquired. They transferred it, together with the secret interest of Thomas, the guardian in the lease, to the defendant the Bull Head Oil Company in exchange for stock in that corporation. They then acquired by purchase from Thomas, for the sum of \$3,500 and an automobile, his interest in the stock of the corporation. Some of the stock which they acquired by this transaction was turned over to their wives who, the court found, took as donees, and some of it was retained and is now held by appellees, and some of it has been transferred by them to innocent purchasers for value. In such a situation, equity adopts the salutary rule that he who fraudulently traffics with a recreant fiduciary shall take nothing by his fraud. The ward or the beneficiary of a trust may, at his option, follow the trust *res* fraudulently diverted until it reaches the hands of an innocent purchaser for value, or he may, at his option, claim the proceeds of the sale or other disposition of the trust *res* in the hands of him who fraudulently acquired it of the fiduciary.

The legal principles governing the right to follow trust funds diverted in breach of the trust were succinctly and accurately stated by Turner, L. J., in *Pennell v. Deffell*, 4 DeGex, M. & G. 372, 388, as follows:

"It is an undoubted principle of this court that as between a *cestui qui trust* and trustee and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruits of such property, whether it is in its original or its altered state, continues to be subject to or affected by the trust."

To the same effect are *Oliver et al. v. Piatt*, 3 How. 333, 40¹; *Lane v. Dighton*, Amb. 409; *Ex parte v. Dumars*, Atkyns, 232, 233; *Taylor v. Plummer*, 3 Maule & Selwyn,

562, 571; *Cobb v. Knight*, 74 Me. 253; *People v. California Safe Deposit & Trust Co.*, 175 Cal. 756; *Hubbard v. Burrell*, 41 Wis. 365.

The rule is the same as against a fraudulent vendee who has exchanged the property purchased for other property. *American Sugar Refining Co. v. Fancher*, 145 N. Y. 552.

The rule is the same with respect to the proceeds of property tortiously misappropriated and found in the hands of the tort feasor or his transferee with notice. *Newton v. Porter*, 69 N. Y. 133.

Dunn and Gillam, when they fraudulently acquired the Thomas lease by the corrupt action of the guardian, which action they actively induced, became trustees *ex maleficio* of the lease, and as such trustees they became equitably bound to hold the lease for the benefit of the ward or, in the event of a sale or other disposition of it, to hold its proceeds upon a like obligation. Any other rule would enable the fraudulent recipient of trust property, acquired through a breach of trust, to render himself immune to the remedial action of equity by the simple expedient of transferring the trust *res* thus acquired to an innocent purchaser for value, or otherwise placing it beyond the reach of the defrauded beneficiary of the trust. Nor are they in any better situation with respect to the stock which they acquired by purchase from Thomas with full knowledge that it was a part of the proceeds of the lease fraudulently acquired from the guardian and by them fraudulently transferred to the Oil Company. Not being innocent purchasers, they took it impressed with the trust to which the lease itself was subject. *Newton v. Porter, supra*.

The plaintiff's bill was framed in conformity to the rule as we have stated it. It prayed cancellation of the lease in the hands of the Bull Head Oil Company, the transferee of Dunn and Gillam; "but if for any reason the

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Court shall hold" that the lease could not be cancelled, then it prayed that the stockholders be adjudged to hold the stock in trust for the plaintiff. The District Court having decreed that the leasehold itself could not be followed into the hands of the Bull Head Oil Company, the plaintiff was not barred from claiming the proceeds of the lease in the form of stock or money in the hands of those stockholders who were not innocent purchasers for value, and the pleadings were appropriately framed to that end. Suit to establish an equitable claim to specific property does not bar a recovery of the proceeds of that property if it develops in the course of the trial that the defendant has conveyed it away in violation of his equitable obligation to the plaintiff. *Taylor v. Kelly*, 3 Jones, Eq. 240; *Haughwout v. Murphy*, 22 N. J. Eq. 531-547; *Valentine v. Richardt*, 126 N. Y. 273; *Sugg v. Stowe*, 5 Jones Eq. 126; *Siter's Appeal*, 26 Pa. 178; *Frick's Appeal*, 101 Pa. 485; *Bartz v. Paff*, 95 Wis. 95. See also *Jervis v. Smith*, 1 Hoffman's Chancery Rep. 470; *Daniel's v. Davison*, 16 Vesey 249; and 1 Sugden on Vendors, 277.

In *Valentine v. Richardt*, *supra*, suit was brought in equity to cancel a conveyance of real estate for fraud. The alleged fraudulent grantee, and his grantee and a subsequent mortgagee, were made parties defendant, and the relief demanded was that the two conveyances and the mortgage be declared void and that they be surrendered up and cancelled, and for such further and other relief as might be just. On the trial the court found that the first conveyance was procured by fraud, but that the second conveyance and the mortgage were taken in good faith for value, and the complaint was dismissed as to them. It was held that the first grantee was a trustee of the property *ex maleficio*; that the bill might be retained against the first grantee and that the plaintiff might, in equity, secure a money judgment for the value of the land, *not as damages*, but as a substitute for the land it-

self, and that, under the frame of the bill and prayer, the court had power to render any judgment consistent with the facts alleged and proved; a principle of decision which we think is exactly applicable to the present case. See also *Mooney v. Byrne*, 163 N. Y. 86.

The compromise agreement entered into by plaintiff with defendants other than Dunn and Gillam was not technically a confirmation of the lease. It was both in form and in substance only an abandonment of an appeal from a decree of the court, adjudging an indefeasible title to the lease to be in the defendant corporation. The practical effect was to enable the other stockholders, at a price, to lessen the danger of being involved in the fraud by their probable guilty knowledge of it. But even if it were deemed to be a confirmation of the lease, such a confirmation is not inconsistent with a recovery of the proceeds of the lease from Dunn and Gillam and those claiming under them, nor, as has been pointed out, does it bar a recovery of the proceeds. Indeed, a recovery of the proceeds of the assignment of the lease by Dunn and Gillam could be predicated only on a confirmation of the transfer which would bar a recovery of the leasehold itself. *Bonner v. Holland*, 68 Ga. 718; *Cavieux v. Sears*, 258 Ill. 221; *Beltencourt v. Beltencourt*, 70 Ore. 384, 396.

Nor do we find it necessary to consider the question whether Eaves, the curator, or Thomas, the guardian, properly represented the minor, or whether either of them possessed exclusively the power to dispose of the property of the minor, or to determine the precise legal effect of the addition of Eaves' signature to the Thomas lease. Thomas, under whom Dunn and Gillam claim, assumed to act as guardian in the disposition of his ward's property. Dunn and Gillam dealt with him in that capacity. On common law principles they cannot deny the legal capacity in which their lessor purported to act in executing the lease under which they claim. *Clary v. Ferguson*, 8

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Porter 501; *Pouder v. Catterson*, 127 Ind. 434; *Wolf v. Holten*, 92 Mich. 136; 104 Mich. 108; *Parker v. Raymond*, 14 Mo. 535; *Steel v. Gilmour*, 77 App. Div. (N. Y.) 199, 203; *Steuber v. Huber*, 107 App. Div. (N. Y.) 599; *Shell v. West*, 130 N. C. 171; *Caldwell v. Harris*, 4 Humphrey 24; Tiffany Landlord & Tenant, § 78 h & j. This is the rule adopted by the statute of Oklahoma. See § 5247 Compiled Statutes of Oklahoma, 1921; *Avery v. VanVoorhis*, 42 Okla. 232, 241. In a suit founded upon the very existence of the lease and praying relief from its execution and legal operation because procured by the fraud of the lessees, the lessees cannot claim under the lease, hold the benefits derived from it, and, at the same time deny the power and authority of the lessor to execute it.

We can perceive no reason why a doubtful or uncertain claim of Dunn and Gillam to the leasehold, sufficient nevertheless to constitute the consideration for the compromise contract with Mullen (*Blount v. Wheeler*, 199 Mass. 330; *Zoebisch v. VonMindern*, 120 N. Y. 406; *Dredging Co. v. Hess*, 71 N. J. L. 327) could not become the subject matter of a trust arising *ex maleficio* from the fraud of Dunn and Gillam and, upon principles already referred to, it follows that if Dunn and Gillam could not resist a bill to compel the cancellation of the lease, they cannot now resist the prayer that they account for the proceeds of the lease acquired by their sale of it and which are the direct fruits of their fraud.

A period of about six years elapsed between the giving of the Thomas lease and the filing of the bill. The defendants neither pleaded nor have they urged laches as a defense; nor do we find in the record any adequate basis for denying relief on that ground. One who claims the benefit derived from a breach of trust in which he actively participates and who shows no prejudice resulting from the delay in bringing suit to compel him to account

cannot complain of laches. See *Insurance Company v. Eldridge*, 102 U. S. 545, 548.

We hold that Dunn and Gillam were constructive trustees of whatever interest they acquired in the Thomas lease and of the proceeds derived from the transfer thereof to the Bull Head Oil Company, whatever its form, whether stock or money, and that they and all defendants claiming under them, other than innocent purchasers for value, may in equity be compelled to account to the plaintiff for such proceeds, for the benefit of the minor.

The decree of the Circuit Court of Appeals, with respect only to the defendants T. H. Dunn, N. E. Dunn, J. Robert Gillam and Mrs. J. Robert Gillam, is reversed and the cause remanded to the District Court for further proceedings in accordance with this opinion; as to the other defendants the appeal was barred by the agreement entered into by the appellant with them and as to them the decree of the Circuit Court of Appeals is affirmed.

So ordered.

Reversed, in part; affirmed, in part.
